Court, U.S.
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No. ____

In the Supreme Court of the United States

BRENT GISSLEN,

Petitioner,

v.

CITY OF CRYSTAL, MINNESOTA, a municipality, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN CHARLES FIEBIGER
Counsel of Record

2500 WEST COUNTY ROAD 42
SUITE 190
BURNSVILLE, MN 55337
(952) 746-5171

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

Whether the Rooker-Feldman doctrine defeats subject matter jurisdiction over an individual's constitutional claims in federal court against a city and individual defendants in their personal capacities pursuant to 42 U.S.C. Sections 1983, 1985 and 1986 when no right or reasonable opportunity existed to litigate the claims in a prior state condemnation case?

Can the Seventh Amendment right to trial by jury be denied by application of the Rooker-Feldman doctrine to claims for constitutional deprivations under 42 U.S.C. Sections 1983, 1985 and 1986 based upon a prior state condemnation case where no right to jury trial on constitutional liability and damages was available in the state court?

PARTIES TO THE PROCEEDING

Petitioner

Brent Gisslen

Respondents

City of Crystal, a municipality; E. Gary Joselyn, individually and in his official capacities; Thomas A. Mathisen, individually and in his official capacities; and Jerry Dulgar, individually and in his official capacities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brent Gisslen (Gisslen) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit (Eighth Circuit).

OPINIONS BELOW

The Eighth Circuit issued its decision on September 26, 2003 and the decision is reported at 345 F. 3d 624 (8th Cir. 2003). App. 2.a. The order denying the petition for re-hearing and re-hearing en banc was issued on November 6, 2003. App.1a. The decision of the United States District Court for the District of Minnesota, the Honorable Michael J. Davis, was issued on November 7, 2001. App.13a.

JURISDICTION

The district court had original jurisdiction pursuant to 28 U.S.C. Section 1343 for claims of 42 U.S.C. Sections 1983, 1985 and 1986. The Eighth Circuit's decision on the appeal was filed on September 26, 2003. A timely petition for re-hearing and re-hearing en banc was filed and the order by the Eighth Circuit denying the petition was issued on November 6, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254 (1) and 2106, and Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this petition are as follows: 42 U.S.C. Section 1983, Civil action for deprivation of rights; 42 U.S.C. Section 1985, Conspiracy to interfere with civil rights; 42 U.S.C. Section 1986, Neglect to prevent conspiracy; and 28 U.S.C. Section 1343, Civil rights and elective franchise. App. 43a-45a.

STATEMENT OF THE CASE

On May 25, 2000, Brent Gisslen (Gisslen) sued the City of Crystal (City), E. Gary Joselyn (Joselyn), Thomas A. Mathisen (Mathisen) and Jerry Dulgar (Dulgar), individually and in their official capacities in federal district court for constitutional deprivations of free speech, due process, equal protection, just compensation, conspiracy, and failure to prevent the conspiracy pursuant to 42 U.S.C. Sections 1983, 1985 and 1986. Joselyn, Mathisen and Dulgar were a city councilman, city engineer and city manager, respectively, for the City.

Gisslen sought damages for being retaliated against for complaining about the City and confronting the City dating back to 1989. Gisslen was a neighbor of Joselyn's and owned a house and property adjoining what was known as Hagemeister Pond (Pond) in the City of Crystal, Minnesota.

Gisslen planned to eventually build his dream home on the property. His problems began with the City wanting a sewer easement for the Pond on Gisslen's property and a dispute over the amount to be paid to Gisslen. The City commenced eminent domain proceedings against his property for the sewer easement in August of 1990 and Gisslen represented himself. Gisslen ultimately received more than the City originally offered and the City was required to maintain the easement.

Gisslen's encounters with the City continued into 1991 when he was ordered by Dulgar to stop a grading project on his property after receiving approval by the city building inspector. The City later tabled Gisslen's request for a grading permit. Shortly thereafter, the City dumped two large truckloads of asphalt onto Gisslen's property without permission. Gisslen complained to the County Department of

Environmental Management about the City's depositing hazardous waste on his property.

Gisslen sent Dulgar and the Shingle Creek Watershed Commission a letter in September of 1991 outlining complaints about the easement litter dumping, illegal pumping by the City between watershed districts, sediment build up in the Pond resulting from improper maintenance by the City, and flood plain violations. The Watershed District responded and notified the district's commissioners and their attorney. The Minnesota Department of Natural Resources (DNR) was notified of the pumping violations. Other disputes arose including Gisslen's complaints to the Minnesota Pollution Control Agency (MPCA) about the City dumping crushed asphalt onto his property, a successful lawsuit by Gisslen in 1993 against the City for interfering with a contract for dirt fill on his property, littering and dumping onto the sewer easement and lack of maintenance by the City, as well as the City's failure in maintaining the flowage of sediment into the Pond.

The City failed to install a riprap or headwall at the sewer outlet resulting in the formation of a sediment delta in the Pond, a DNR wetland. The City failed to correct the problem. Gisslen retained an attorney who contacted the City and Mathison about the improper maintenance of the sewer easement. Mathisen was indignant to Gisslen and his attorney, directing a profanity laced tirade at them at city hall in front of other city staff. Mathisen was upset about Gisslen's complaints about the sewer easement, the Pond, and improper pumping between watersheds.

Gisslen, his attorney and engineer, and representatives from state and local agencies met at Gisslen's property with Mathisen to examine the storm water sewer outlet into the Pond. The state and local agency officials determined that the

outlet was in an "obvious state of disrepair and is in need of maintenance". This was attributed to the City's failure to maintain the sewer easement. The City had maintained upper ponds in the system but had failed to maintain Gisslen's Pond, resulting in damage and sediment build up. Gisslen and his attorney began discussions with the City about the clean up as well as costs for doing so. The City, however, did little to facilitate the process.

Joselyn, meanwhile, proposed to a parks committee that the City look into acquiring Gisslen's property for use as a park. Joselyn failed to apprise other committee members of the ongoing dispute between Gisslen and the City about the sediment build up caused by the City's failure to maintain the easement.

The City was aware of Gisslen's desire to build his dream house on the property. In March of 1997 the City applied for a scenic area grant in order to purchase Gisslen's property that was later denied. The City had made no mention to Gisslen or his attorney of this intention and failed to notify them about a hearing on the matter. Soon thereafter, Joselyn and others from the committee were caught trespassing on Gisslen's property. Gisslen's attorney complained to the City. The City convened private meetings with Gisslen's neighbors about the park concept, again failing to mention the sewer easement dispute or his other complaints. Gisslen continued to raise complaints about the City's continued improper pumping between watershed districts without proper permits.

Soil boring testing on the Pond for the sediment problem was delayed by the City until late in the summer of 1997. Mathisen sent Gisslen's attorney the testing report on October 28, 1999, and indicated that sediment removal could be undertaken during the winter. This work, however, was

never contracted for by the City and, instead, the City passed a resolution on November 18, 1997, to take Gisslen's property and the Pond by eminent domain purportedly for use as a park. The City did not authorize eminent domain for any other properties at the time. The City subsequently authorized the taking of another landlocked parcel of Gisslen's that had no access to Gisslen's other property or the Pond.

The condemnation proceeding went before the state district court. The state court's order of March 13, 1998, recognized the right of the city to exercise eminent domain and ordered the taking of Gisslen's property for the public purpose in furtherance of the City's plans to use the property for park, recreation and open space purposes. App. 23a. The court also appointed three commissioners to determine the value of the property. Id.

The City subsequently entertained proposals from developers in March and June of 1998 to use Gisslen's property not for park space, but townhome developments. App. 41-42a. On November 13, 1998, the commissioners filed their award for the property at $158,500. Pursuant to statute, Gisslen appealed the award. He retained counsel for the appeal stage of the condemnation proceedings. On April 29, 1998, a jury awarded Gislsen $192,553 for the property. Gisslen and the city entered a stipulation of settlement on June 14, 1999 wherein the City agreed to pay the judgment in exchange for Gisslen not appealing.

The City deposited street sweepings onto his property before the condemnation was completed and his property value determined. Later, after the condemnation, the City acquired property adjacent to Gisslen's in 2000 and sold them to a private developer by bid. A new home was constructed on land adjacent to Gisslen's much like the home Gisslen

wanted to build. The City continued to pump between watershed districts and Gisslen complained to the DNR.

Gisslen sued in federal court alleging constitutional deprivations of free speech, equal protection, substantive due process, just compensation, conspiracy and failure to prevent conspiracy in violation of 42 U.S.C. Sections 1983, 1985 and 1986. Jurisdiction was invoked under 28 U.S.C. Section 1343 and 1331. The district court dismissed Gisslen's Complaint for lack of subject matter jurisdiction, applying the Rooker-Feldman doctrine to conclude that the federal and condemnation claims were "inextricably intertwined". The Eighth Circuit affirmed the district court and Gisslen's timely petition for re-hearing and re-hearing *en banc* was denied on November 6, 2003. App. 1a.

This case involves questions of exceptional importance to federal jurisprudence in the context of subject matter jurisdiction of the federal courts over claims for constitutional deprivations brought in federal court under 42 U.S.C. Sections 1983, 186 and 1986 under the court's original jurisdiction of 28 U.S.C. Section 1343. The decision of the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) conflicts with the Rooker-Feldman doctrine established by this Court's decisions in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983) and Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) as well as decisions from sister Circuit Courts of Appeal. Review by this Court is necessary to engender uniformity among all federal courts in application of the Rooker-Feldman doctrine, to preserve the original jurisdiction of the federal courts in Section 1983 and 1985 actions, and to preserve the Seventh Amendment right to trial by jury in federal court.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted to establish uniform application of the Rooker-Feldman doctrine to prevent evisceration of an individual's right to bring claims in federal court for constitutional deprivations pursuant to 42 U.S.C. Sections 1983, 1985 and 1986 when no right or reasonable opportunity to do so existed in the state court proceeding.

The Eighth Circuit's application of Rooker-Feldman to bar subject matter jurisdiction for claims pursuant to 42 U.S.C. Sections 1983, 1985 and 1986 eviscerated Gisslen's rights to remedies afforded by those federal statutes for constitutional deprivations of free speech, equal protection, and substantive due process. Gisslen never enjoyed a right or reasonable opportunity to litigate those claims in state court under the law of eminent domain in Minnesota. The Eighth Circuit's journey to decide that Gisslen's state condemnation case was "inextricably intertwined" with his claims for constitutional violations under 42 U.S.C. Sections 1983, 1985 and 1986, conflicts with the Rooker-Feldman doctrine and decisions of other Circuit Courts of Appeals. This Court should address and resolve the conflicting approaches of federal courts for establishing that a final state court judgment is inextricably intertwined with the Complaint raised in federal district court. Unless this is done, parties whose civil rights have been violated will be denied access to federal courts for not raising federal statutory civil rights claims in state court even when no right or opportunity to do so exists under state law. Rooker-Feldman should not become a sword to defeat federal claims and substantive rights that could not have been raised in state court proceedings.

Review is especially important in Section 1983 cases involving deprivation of constitutional rights by municipalities

and individuals acting under of color of state law. The ability of individuals to bring claims for violations of constitutional rights under 42 U.S.C. Sections 1983, 1985 and 1986 in federal court under the court's original jurisdiction in 28 U.S.C. Section 1343 should not be defeated by Rooker-Feldman, especially when they cannot be raised in state proceedings.

The Rooker-Feldman doctrine provides that district courts do not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S. Ct. 149, 150, 68 L. Ed 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S. Ct. 1303, 1311, 75 L.Ed. 2d 206 (1983). *See* Charchenko v. City of Stillwater, 47 F. 3d 981, 983 (8th Cir. 1995). The only court with jurisdiction to review decisions of state courts is the United States Supreme Court. Feldman, 460 U.S. at 486, 103 S. Ct. at 1316; Charchenko, 47 F. 3d at 983. The Circuit Courts have analyzed Rooker-Feldman subject matter jurisdiction over general constitutional challenges by examining whether or not these claims are inextricably intertwined with the claims asserted in state court. Feldman, 460 U.S. at 486-87; *See* Charchencko v. City of Stillwater, 47 F. 3d 981, 983 (8th Cir. 1995); Brokaw v. Weaver, et al, 305 F. 3d 660, 668 (7th Cir. 2002); Dale v. Moore, 121 F. 3d 624, 626 (11th Cir. 1997); Gulla v. North Strabane Township, et al, 146 F. 3d 168, 171(3rd Cir. 1998); Moccio v. New York State Office of Court Administration, 95 F. 3d 195, 198-99 (2d Cir. 1996); Robinson v. Ariyoshi, 753 F. 2d 1468, 1472 (9th Cir. 1985); Brown & Root, Inc. v. Breckenridge, 211 F. 3d 194, 198 (4th Cir. 2000).

Application of the Rooker-Feldman and determining which federal claims are "inextricably intertwined" with prior state court judgments has been varied and inconsistent among

federal courts. The effect is to deprive individuals from access to the federal courts to litigate claims for violation of constitutional rights under 42 U.S.C. Sections 1983, 1985 and 1986 that were not litigated in state court because state law provided no right or opportunity for doing so.

The Second Circuit Court of Appeals in Moccio, supra, described the problem this way:

> "Since Feldman, the Supreme Court has provided federal courts with little guidance in determining which claims are 'inextricably intertwined' with a prior state court judgment and which are not. But see Pennzoil Co. v. Texaco, Inc., 481 U. S. 1, 24-26, 95 L.Ed. 2d 1, 107 S. Ct. 1519 (1987) (Marshall, J., concurring)(applying Rooker-Feldman). The result has been inconsistency in the lower federal courts faced with challenges based upon the Rooker-Feldman doctrine. *See* Gary Thompson, Note "The Rooker-Feldman Doctrine & the Subject Matter Jurisdiction of Federal District Courts, 42 Rutgers L. Rev. 859, 880-84 (1990)".

95 F. 3d at 198.

The Eighth Circuit has dissected the notion of "inextricably intertwined" and observed that Rooker-Feldman deprives federal courts of jurisdiction over general claims not raised before the state court only where such claims are inextricably intertwined with the state court judgment, "a claim – particularly a claim under federal law – is not precluded if it is 'separable from and collateral to the merits of the state court judgment'". Lemonds v. St. Louis County, 222 F.3d 488, 493 (8th Cir. 2000), citing Fiedler v. Credit Acceptance Corp., 188 F.3d 1031, 1034 (8th Cir. 1999)(quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 21 (1987)(Brennan, J. concurring). The constitutional challenge

can sometimes be made in federal court so long as the general federal challenge does not involve review of the state court decision. Lemonds, 222 F. 3d at 496. According to the Eighth Circuit, deciding whether Rooker-Feldman applies "requires determining exactly what the state court held." Charchenko v. City of Stillwater, 47 F. 3d 981, 983 (8th Cir. 1995). In Gisslen's case, however, the Eighth Circuit looked at other considerations.

Eighth Circuit Discord

After deciding Gisslen, and denying his petitions for re-hearing and re-hearing *en banc*, a different panel of the Eighth Circuit addressed another factor in examining the Rooker-Feldman doctrine instead of only the inextricably intertwined analysis. *See* Davis v. Huckabee, et al, No. 02-3694/02-3695 (8th Cir. 2004). Not every federal claim which would cast doubt on a state court judgment is barred by Rooker-Feldman. Id. In Davis, the Eighth Circuit noted the inextricably intertwined analysis may be inapplicable where federal plaintiffs have not been given a reasonable opportunity to raise their federal claims in the state proceedings. Id, citing Lemonds v. St. Louis County, 222 F. 3d 488, 495-96 (8th Cir. 2000)("we recognize that some courts have declined to apply [Rooker-Feldman] where the federal plaintiff lacked a reasonable opportunity, through intervention or otherwise, to litigate their claims in state court"). The Eighth Circuit observed in Davis that this position was in accord with the views of other circuits. Id; *See e.g.*, Brown & Root, Inc., v. Breckenridge, 211 F. 3d 194, 201 (4th Cir. 2000)(noting that Rooker-Feldman does not bar a claim where a party lacked a reasonable opportunity to raise the issue in state proceedings); Long v. Shorebank Dev. Corp., 182 F. 3d 548, 558 (7th Cir. 1999)("an issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings");

Dale v. Moore, 121 F. 3d 624, 626 (11th Cir. 1997)(noting that Rooker-Feldman does not bar a claim where a party lacked a reasonable opportunity to raise the issue in state proceedings); Moccio v. New York Office of Court Admin., 95 F. 3d 195, 199-200 (2d Cir. 1996)(same).

In Gisslen's case, the Eighth Circuit went beyond looking exactly at what the state court held, as well as the inextricably intertwined analysis. Instead, the Eighth Circuit adopted its own interpretation of Minnesota's eminent domain laws and determined that federal civil rights claims against other individuals could be raised in a state condemnation case, although never done before. The state court never considered violations of Gisslen's constitutional rights by the City, Joselyn, Dulgar and Mathisen. The individuals were not parties to the condemnation case and there would have been no reason for them to have been parties. The Eighth Circuit reviewed Gisslen's condemnation case and the Minnesota eminent domain statutes and determined that Gisslen could have added claims to the condemnation proceeding, despite no statutory authority or Minnesota caselaw authorizing Section 1983, 1985 or 1986 claims in eminent domain proceedings. App. 9a. Rooker-Feldman is not a vehicle for federal courts to defeat subject matter jurisdiction for Section 1983, 1985 and 1986 claims that could not be, and were not, raised, addressed or adjudicated in the state court eminent domain case. The Eighth Circuit stepped beyond evaluating exactly what the state court decided and added its own erroneous interpretation of Minnesota eminent domain law. The procedural inability of Gisslen to raise Section 1983, 1985 and 1986 claims against non-parties to the condemnation case underscores the fundamental unfairness of depriving Gisslen of the original jurisdiction of the federal courts for those claims under 28 U.S.C. Section 1343. This Court should grant certiorari to harmonize the ability of the federal courts

to defeat subject matter jurisdiction by imposing the Rooker-Feldman doctrine to Section 1983, 1985 and 1986 claims against individuals and a municipality in federal court. Federal courts should be required to examine whether the federal plaintiff had a right or reasonable opportunity to raise the federal claims in the state proceeding.

Gisslen's claims under 42 U.S.C. Section 1983 for deprivation of free speech, equal protection and substantive due process, as well as conspiracy under Section 1985, and neglect to prevent conspiracy under Section 1986, do not involve a review of the state court condemnation judgment. Gisslen never asked in his federal civil rights case that the state condemnation judgment be reversed or his property returned. He has not alleged that the state condemnation decision was incorrect or that the decision itself violated his constitutional rights. Instead, he contends that the people involved in making the decisions violated his constitutional rights, independent of the state court decision. *See* Brokaw, 305 F. 3d at 665 (plaintiff not contending that the state court decision was incorrect or that the decision violated her constitutional rights, but that individuals involved in the decisions violated her constitutional rights independent of the state court decision). Gisslen was injured by the unconstitutional conduct of Joslyn, Dulgar and Mathisen along with the unconstitutional customs, policies and practices of the City. Brokaw, 305 F. 3d at 669. The Eighth Circuit stated otherwise:

> "If Gisslen were to prevail in the district court, that would necessarily entail a ruling that the state court wrongly decided that: 1) the taking was in the public interest and/or 2) Gisslen had been fairly compensated for the loss of his property".

App. 7a.

Gisslen never had a right or reasonable opportunity to present his constitutional claims for violation of 42 U.S.C. Sections 1983, 1985 and 1986 in the eminent domain proceeding.

In Long v. Shorebank Development Corp., 182 F. 3d 548 (7th Cir. 1999), the Seventh Circuit addressed whether the Rooker-Feldman doctrine barred the plaintiff's federal claims. Long sued her landlord, Shorebank Development Corporation, South Shores Associates, and their attorneys, alleging that the defendants unlawfully caused her to be evicted from her home in violation of the Fair Debt Collection Practices Act (FDCPA) and violated her due process rights. Id at 551. The court analyzed her claims under Rooker-Feldman and it appeared that her claims would be barred under the doctrine because absent the eviction order against her she would not have suffered any injuries. Id at 557. However, after discussing the general applicability of the Rooker-Feldman doctrine, Long further explained that the Rooker-Feldman doctrine can only apply where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings. Long, 182 F. 3d at 558 (quoting Wood v. Orange County, 715 F. 2d 1543, 1547 (11th Cir. 1983). The court noted that under Illinois law, "[a] forcible entry and detainer proceeding is a summary statutory action to adjudicate possession rights and should not be burdened by other matters unrelated to issues of possession." Long, 182 F. 3d at 559, citing People ex rel. Dep't of Trans. v. Walliser, 258 Ill. App. 3d 782, 629 N.E. 2d 1189, 1194, 196 Ill. Dec. 345 (Ill. Ct. App. 1994). The court noted that her complaint before the federal district court raised claims under two federal statutes, the FDCPA and Section 1983, that provided a basis for subject matter jurisdiction where she sought monetary damages. Id at 559. The court noted that:

> ... "there has been absolutely no showing that a defendant has ever asserted the rights provided for in the FDCPA as an affirmative defense or brought a counterclaim under this statute in a forcible entry and detainer action in Illinois. It is likely that Long's claims for damages under the FDCPA and Section 1983 would not have been germane to the forcible entry and detainer action brought by defendants."

Long, 182 F. 3d at 559-60.

The Seventh Circuit concluded in Long that because the claims could not have been presented before the state court during the forcible entry and detainer proceedings, the plaintiff did not have a reasonable opportunity to raise her claims in state court and, therefore, the claims were not inextricably intertwined with the state court's judgment to bar her Section 1983 claim. Id. at 560.

The Eleventh Circuit addressed this issue in Wood v. Orange County, 715 F. 2d 1543 (11th Cir. 1983). In Wood the plaintiffs were defendants in separate state criminal proceedings in Florida. The court adjudged them insolvent and appointed them public defenders. They signed affidavits containing a waiver clause that informed them of the possibility of a lien against their property for the value of the public defender services. Wood, 715 F. 2d at 1545. The liens were later imposed and the plaintiffs sued claiming violation of due process. Id. The defendants argued the claims were barred by the Rooker-Feldman doctrine because they could have raised constitutional challenges to the lien procedure at several stages of the state proceedings. The court in Wood acknowledged the rule in Rooker that by failing to raise one's claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. Wood, 715 F. 2d at 1546-47, citing

Rooker. The Eleventh Circuit, however, noted an important limitation to the rule:

> The rule can only apply where the plaintiff has a reasonable opportunity to raise his federal claim in state proceedings. Where the plaintiff has had no such opportunity, he cannot fairly be said to have "failed" to raise the issue. Moreover, an issue that a plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case.

Wood, 715 F. 2d at 1547.

Interpreting Rooker to preclude a federal district court from considering an issue that the plaintiff had no reasonable opportunity to raise in state court might pose due process problems. Wood, 715 F. 2d at 1547. Such a harsh rule might deprive the plaintiff of any forum, state or federal, where he has a reasonable opportunity to present his federal constitutional claims, a result arguably contrary to the requirements of due process. Id; *See* Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810, 91 L.Ed. 967 (1947); General Oil Co. v. Crain, 209 U.S. 211, 28 S. Ct. 475, 52 L.Ed. 754 (1908).

The Eighth Circuit did not use the same test of whether Gisslen had a reasonable opportunity to raise his federal claims in state court based on the actual state court proceedings as other Circuits. Gisslen is denied due process to proceed on his Section 1983, 1985 and 1986 claims if he is required to raise them in the midst of a state condemnation proceeding. The most that likely could have been done with such issues would have been injunctive relief by the state district court, not compensatory and punitive damages. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 713 (1999). The effect of denying subject matter jurisdiction in federal court of Gisslen's federal statutory claims is to deny him notice and opportunity to be heard before a jury on his

constitutional claims for damages against the City, Joselyn, Mathisen and Dulgar.

Gisslen Raised Different Claims Against Different Parties in Federal Action

The Eighth Circuit paid little attention to the different individual defendants named in Gisslen's federal Complaint for violations of 42 U.S.C. Section 1983, 1985 and 1986. Gisslen sought compensatory and punitive damages against these individuals in his federal Complaint, but the Eighth Circuit essentially held that the damages sought by Gisslen were the same as in the condemnation case: just compensation. App. 8a. The damages for the value of the taking of Gisslen's property in the condemnation case did not include compensatory or punitive damages against any party.

Determining liability of the City for Section 1983 deliberate indifference involves different factors and considerations than determining liability for the intentional acts of individual defendants. *See e.g.*, Canton v. Harris, 489 U.S. 378, 388 (1978)(deliberate indifference to known or obvious consequences of facially lawful municipal act that leads to violation of plaintiff's constitutional rights is actionable); Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997). Supervisory officials can be liable in their official capacity under Section 1983 without personal liability. These actions will bind the agencies of the official. *See* Headley v. Bacon, 828 F. 2d 1272 (8th Cir. 1987). Individual defendants can be personally liable for Section 1983 without liability of the City. Headley v. Bacon, 828 F. 2d at 1279 (8th Cir. 1987); Beard v. O'Neal, 728 F. 2d 894, 896-97 (7th Cir. 1984)(FBI informant and officials sued in individual capacities not in privity with FBI agent who was defendant in prior unsuccessful Bivens type action), cert. denied, 469 U.S. 825, 105 S.Ct. 104, 83 L. Ed. 2d 48

(1984); *cf* Garza v. Henderson, 779 F. 2d 390, 393-94 (7th Cir. 1985)(prison discipline committee sued in official and personal capacities not collaterally estopped by judgment in prior habeas corpus proceeding against warden). The Eighth Circuit avoided addressing the personal liability of Joselyn, Dulgar and Mathisen for Gisslen's Section 1983, 1985 and 1986 claims and implicitly found them barred by applying the Rooker-Feldman doctrine. The unconstitutional motivations of Joselyn, Dulgar and Mathisen exist independent of the City's public use reasons. Their personal liability for violations of Gisslen's constitutional rights under 42 U.S.C. Sections 1983, 1985 and 1986 was never decided by the state court in the condemnation proceedings nor was there a reasonable opportunity or right to litigate those claims.

The distinction in remedies available under Sections 1983, 1985 and 1986 from state condemnation law is more than semantics. In condemnation, damages are paid by the public for the value of the property taken. The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. Bauman v. Ross, 167 U.S. 548, 574 (1897). He is entitled to receive the value of what he has been deprived of, and no more. Id. To award him less would be unjust to him; to award him more would be unjust to the public. Id. Property owners are not compensated by other individuals in eminent domain. Compensatory and punitive damages against Joselyn, Dulgar and Mathisen for violation of 42 U.S.C. Sections 1983, 1985 and 1986 are authorized by Congress to remedy violation of Gisslen's constitutional rights to free speech, equal protection and due process. These statutes entitle him to seek compensation for pain and suffering, emotional distress, humiliation and other losses. Punitive damages are available. The same compensatory and punitive damages are not available as just compensation for taking his

land. The underlying liability and mode of such damages is separable and distinct from "just compensation" for the value of his land.

Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." State Farm Mutual Automobile Company v. Preece, et al, 123 S. Ct. 1513, 155 L.Ed. 2d 585, 600 (2003), citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432, 149 L. Ed. 2d 674, 121 S. Ct. 1678 (2001)(citing Restatement (Second) of Torts, Sec. 903, pp. 453-453 (1979)). By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. State Farm, supra; Cooper Industries, supra, at 432; *see also* BMW of North America, Inc. v. Gore, 517 U.S. 559, 568, 134 L.Ed. 2d 809, 116 S. Ct. 1589 (1996)("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19, 113 L.Ed. 2d 1, 111 S. Ct. 1032 (1991)("Punitive damages are imposed for purposes of retribution and deterrence").

The Eighth Circuit's notion that just compensation awarded by the City for the value of property taken in a condemnation proceeding is the same as compensatory and punitive damages available for violations of Sections 1983, 1985 and 1986 is in direct conflict with the holdings of this Court. Federal laws enacted by Congress for individuals to seek redress against persons acting under color of state law for constitutional liability and damages available under Sections 1983, 1985 and 1986 should not be defeated by the Rooker-Feldman doctrine when no right or reasonable opportunity to present the claims has existed. This Court should clarify these individual rights for actions at law for constitutional violations of 42 U.S.C. Sections 1983, 1985

and 1986 pursuant to the original jurisdiction granted by 28 U.S.C. Section 1343.

State Eminent Domain Statutes Do Not Afford Opportunity or Right to Litigate Federal Civil Rights Claims

Rooker-Feldman can apply only where a plaintiff had a reasonable opportunity to raise his federal claim in the state proceedings. Davis v. Huckabee, supra (8th Cir. 2004); Brokaw v. Weaver, 305 F. 3d at 667-8; Long v. Shorebank Dev. Corp., 182 F. 3d at 588; Gulla v. North Strabane Township, 146 F. 3d at 173, citing Valenti v. Mitchell, 962 F. 2d 288, 296 (3d Cir. 1992)(stating that Rooker-Feldman doctrine and claim preclusion will apply when litigants have had a "full and fair opportunity to litigate their ... claim in state court"). The Eighth Circuit incorrectly analyzed Minnesota's condemnation procedures in upholding the Rooker-Feldman bar of Gisslen's claims. The Court observed that:

> "Gisslen chose to proceed pro se in the condemnation case until after the commissioners entered their award. He offered no evidence before the trial court at the hearing on the petition or before the commissioners. When he did retain counsel and exercise his right to a jury trial on the issue of damages, his attorney did not offer evidence of diminution in value as a result of the City's conduct. He did not seek to add parties to the action. Gisslen had the statutory right to do both. Minn. Stat. Sec. 117.175 subd 1 (2002)."

App. 9a.

The condemnation proceeding against Gisslen was not akin to his civil action in federal court. Condemnation proceedings are in rem and largely administrative. Dow Arneson Co. v. City of St. Paul, 177 Minn. 164, 225 N.W.

92 (1929). The initial hearing on the condemnation petition is the "quick take proceeding". Neither the original "quick take proceeding" or condemnation commissioner's proceeding producing the original damages award in an eminent domain proceeding which could be appealed to the district court have sufficient indicia of a trial to be treated as a civil action. State by Humphrey v. Baillon Co., 503 N.W.2d 799, 803 n. 3 (Minn. App. 1993); *see* Barmel v. Minneapolis St. Paul Sanitary Dist., 201 Minn. 622, 277 N.W. 208 (1938) *see also* Koppikus v. State Capitol Comm'rs, 16 Cal. 248 (1960)(Jury trial is an incident of an action at law; condemnation proceedings are special proceedings and do not have any of the characteristics of an action at law); Lake Erie, etc., Co. v. Heath, 9 Ind. 530 (1857); Allen v. Anderson, 57 Ind. 388 (1877)(Condemnation proceedings do not fall within the category of a "civil case" within the meaning of the Constitution). A property owner has no opportunity to challenge the condemning authority's "appraisal of value" in the quick take proceeding. State by Humphrey v. Baillon Co., 503 N.W. 2d at 803 n.3; *see* Minn. Stat. Sec. The commissioner's proceeding is more inquisitorial than adversarial. State by Humphrey v. Baillon Co., 503 N.W. 2d at 803 n.3. Minnesota Statutes Section 117.175, subd.1 governs appeals from the award of commissioners. The sole issue to be determined at the appeal stage is the amount of damages for the taking. Minn. Stat. Sec. 117.175, subd 1. The proceedings prior to the award of the commissioners, including the petition and evidence thereon, are not before the [district] court for review. State v. Pearson, 110 N.W. 2d 206, 215 (Minn. 1962). The Minnesota supreme court spelled out the limited purpose of the appeal from the commissioners award in Pearson:

> "The jurisdiction of the district court is appellate and the whole scope of that appeal is to secure a full trial

> de novo before a jury on the question of damages, involving basically the same matters submitted to and passed upon by the commissioners in the first instance. In the end, the sole issue before a district court and jury is the amount of damages to be awarded."

Id. at 215.

Gisslen was a respondent to the petition for condemnation filed against him by the City of Crystal. He was unable to add parties for violations of 42 U.S.C. Sections 1983, 1985 and 1986. At most, Minn. Stat. Sec. 117.175, subd. 1 allows the addition of parties to the damages phase of the proceedings. No cases were cited by the Eighth Circuit where this has occurred. More importantly, no cases were cited where individual defendants were added to a condemnation proceeding solely for claims for violation of 42 U.S.C. Sections 1983, 1985 and 1986. Joselyn, Dulgar and Mathisen were not parties to the condemnation case and could not have been named for alleged civil rights violations. They had no bearing on determining damages at the appeal stage under Minn. Stat. Sec. 117.175, subd. 1. for the value of the land. Because Gisslen did not have a right or reasonable opportunity to fairly litigate his Section 1983, 1985 and 1986 claims, the Eighth Circuit erroneously concluded that the federal courts lacked subject matter jurisdiction over the claims under the Rooker-Feldman doctrine.

The public purpose determination in Gisslen's condemnation case likewise did not have the "indicia of trial" requiring full opportunity to litigate all claims and include all parties. Barring Gisslen's claims under 42 U.S.C. Sections 1983, 1985 and 1986 because he did not present evidence to the court at the quick take stage of the condemnation case deprived Gisslen of his right to sue for constitutional

violations protected by federal law. Gisslen did not have the right to add parties for violation of his federal civil rights contrary to the Eighth Circuit's conclusion. Minn. Stat. Sec 117.175, subd 1 (2002) did not afford him the ability to add individual defendants Joselyn, Dulgar and Mathisen to the case. The Eighth Circuit implicitly, and wrongly, presumed that Gisslen had the statutory right to add parties for other **claims**. The Court opined that Gisslen could have added parties under Minn. Stat. Sec. 117.175, subd. 1 (2002). The statutory construction of Minnesota Statutes Section 117.175, subd. 1, however, does not allow the addition of other claims. No cases were cited by the Eighth Circuit where parties and **other claims** outside the condemnation statutes were added. While Minn. Stat. Sec. 117.175, subd. 1 mentions adding parties, it makes no mention of adding claims. The Eighth Circuit's presumption that claims could be added to the condemnation proceeding outside the language of Minnesota Statutes Section 117.175, subd. 1 was legally erroneous.

The Eighth Circuit's erroneous analysis underscored the Court's conclusion that Gisslen could have raised other claims against other parties in the condemnation case. This formed the basis for the Court's conclusion that Gisslen had a reasonable opportunity to present his Section 1983, 1985 and 1986 claims in the condemnation case and the invocation of the Rooker-Feldman doctrine to his federal Complaint.

Under rules of statutory construction, however, the Eighth Circuit cannot read into Minnesota Statutes Section 117.175, subd. 1 (2002) language permitting the addition of other claims not contained in the statute. Where there is no uncertainty or ambiguity in the language, the statute speaks for itself and there is no room for judicial construction. Arlandson v. Humphrey, 27 N.W. 2d 819 (Minn. 1947); *see* Minn. Stat. Sec. 645.16. In construing statutes, the fundamental aim is to ascertain and give effect to the intention

of the legislature as expressed in the statute as a whole. Warren v. Marsh, 215 Minn. 615, 11 N.W. 2d 528 (1943). Courts cannot read into the statute a provision the legislature "purposely omits or inadvertently overlooks". Metropolitan Sports Commission v. Hennepin County, 561 N.W.2d 513, 516-17 (Minn. 1997); Green Giant Co. v. Commissioner of Revenue, 534 N.W. 2d 710, 712 (Minn. 1995); (quoting Wallace v. Commissioner of Taxation, 289 Minn. 220, 230, 184 N.W. 2d 588, 594 (1971)). When a statute is couched in broad and comprehensive language admitting of no exceptions, the court is not justified in engrafting thereon exceptions, however much it may deem the public welfare to require them. State v. Tennyson, 212 Minn. 158, 2 N.W. 2d 833, 835 (1942). The Eighth Circuit's implicit presumption that Minnesota Statutes Section 117.175, subd. 1 (2002) allows the addition of other claims against other parties at the appeal of the commissioner's award, critical to the ruling against Gisslen, is erroneous and a drastic departure from the principles of the Rooker-Feldman doctrine.

Judicial Deference to City's Public Purpose

The Eighth Circuit's focus upon Gisslen's decision not to introduce evidence opposing the propriety and necessity of the taking belies the obligation of the state court to exercise judicial deference to the City's stated public purpose. Judicial deference to a legislative determination that land being condemned is for a public use is *** required until it is shown to involve an impossibility. City of Duluth v. State, 390 N.W. 2d 753, 762 (Minn. 1986)(quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 104 S.Ct. 2321, 2329, 81 L.Ed. 2d 186 (1984)). The role of the judiciary in reviewing condemnation decisions is narrowly limited. Duluth, 390 N.W. 2d at 763. If it appears that the record contains "some evidence, however informal", that the taking serves a public purpose, there is nothing left for the courts to

pass upon. Duluth, 390 N.W. 2d at 763; Housing and Redevelopment Authority v. Minneapolis Metropolitan Co., 259 Minn. 1, 15, 104 N.W. 2d 864, 874 (1960).

Gisslen would have been required to present evidence that the City's public purpose of a park and open space to be an "impossibility". The City merely had to present some evidence, however informal, as to the nature of the public purpose. Gisslen could not overcome this overwhelming presumption of public purpose and judicial deference. This did not equate with a decision on the merits of his later federal civil rights claims against the City and Joselyn, Dulgar and Mathisen and their personal motivations for their conduct toward him. These claims were not decided in the condemnation case and could not have been determined at that time.

Claims Not Ripe Until Final Taking

Gisslen was required to obtain a final decision and utilize state procedures for obtaining just compensation before his Fifth Amendment takings claim became ripe. *See* Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1984); *see also* Christopher Lake Development Co. v. St. Louis County, 35 F. 3d 1269, 1273-4 (8th Cir. 1993); Rolf v. City of San Antonio, 77 F. 3d 823 (5th Cir. 1996). Because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. Williamson County, 473 U.S. at 194, n. 13 (emphasis in original). The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Section 1983 action. Id. Gisslen's claims, even if permitted by the state statutes, were not ripe during the condemnation case as it was not final. The final taking in the state condemnation proceeding established ripeness for

Gisslen's claims for violation of his Fifth and Fourteenth Amendment rights under Williamson County.

II. Certiorari should be granted to safeguard the Seventh Amendment right to trial by jury for constitutional claims in federal court pursuant to 42 U.S.C. Sections 1983, 1985 and 1986.

The application of Rooker-Feldman to Gisslen's claims for violations of 42 U.S.C. Sections 1983, 1985 and 1986 deprived him of his Seventh Amendment right to trial by jury on issues of liability and damages for such claims. The Eighth Circuit stated:

> "Gisslen chose to proceed in the condemnation action without introducing evidence with respect to the propriety and necessity of the taking, and ultimately waived his right to appeal the judgment. He thus failed to raise issues before the trial court that he could have raised and that the trial court would have had jurisdiction to decide. Gisslen cannot avoid the consequences of those choices by asking the district court to rule on matters that could have been part of the condemnation case."

App. 11a.

Gisslen was not entitled to a jury trial at the quick take hearing in the condemnation case. *See* Minn. Stat. Sec 117.075.

The power to take private property for public uses, the right of eminent domain, belongs to every independent government. United States v. Jones, 109 U.S. 513, 518 (1883). It is an incident of sovereignty and requires no constitutional recognition. Id. The appeal of the commissioner's award only dealt with the value of Gisslen's

property and the statute did not authorize amendment of claims. *See* Minn. Stat. Sec. 117.175, subd.1.

This Court has ruled that there is no constitutional right to a jury trial in eminent domain proceedings. United States v. Reynolds, 397 U.S. 14, 18 (1970)(denial of jury trial on issue of project's scope). There is no claim in condemnation cases that the issue is of constitutional dimensions. Id, at 17; *See e.g.*, Bauman v. Ross, 167 U.S. 548, 591, 17 S.C. 966, 983, 42 L.Ed. 2 270, 289 (1897); Long Island Water-Supply Co. v. Brooklyn, 166 U.S. 685, 694, 17 S. Ct. 18, 22, 41 L.Ed. 1165, 1168 (1897); United States v. Jones, 109 U.S. 513, 519, 3 S. Ct. 346, 350, 27 L. Ed. 1015, 1017 (1883); Curtiss v. Georgetown and Alexandria Turnpike Co.,, 10 U.S. (6 Cranch) 233, 3 L. Ed. 209 (1810).

The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...." City of Monterey v. Del Monte Dunes, 526 U.S. 687, 708, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). In determining the right to jury trial, this Court has been guided by historical analysis comprising two principal inquiries: whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was. Id, 526 U.S. at 708. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. Id (citations omitted). This Court has recognized that "suits at common law" include "not merely suits, which the common law recognized among its old and settled proceedings, but [also] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered". City of Monterey v. Del Monte Dunes, 526

U.S. at 708, citing Parsons v. Bedford, 3 Peters 433, 447 (1830). The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action '"analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard in courts of equity or admiralty.'" Id, 526 U.S. at 708-09; Felter v. Columbia Pictures Television, Inc., 523 U.S. 340, 348, 140 L. Ed. 2d 438, 118 S. Ct. 1279 (1998)(quoting Granfinanciera v. S.A. v. Nordberg, 492 U.S. 33, 42, 106 L.Ed. 2d 26, 109 S. Ct. 2782 (1989)). This Court held in City of Monterey v. Del Monte Dunes that a Section 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment. 526 U.S. at 709. Language by this Court in Del Monte Dunes is instructive:

> It is undisputed that when the Seventh Amendment was adopted there was no action equivalent to Section 1983, framed in specific terms for vindicating constitutional rights. It is settled law, however, that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to 'sound basically in tort,' and seek legal relief. Curtis, 415 U.S. at 195-196.

526 U.S. at 709.

The Court continued in Del Monte Dunes to observe:

> [t]here can be no doubt that claims brought pursuant to Section 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, Section 1983 provides relief for invasions of rights protected under federal law. Recognizing the essential character of the statute, 'we have repeatedly noted that 42 U.S.C. Section 1983 creates a species of tort liability,' Heck

> v. Humphrey, 512 U.S. 477, 483, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994)(quoting Memphis Community School District v. Stachura, 477 U.S. 299, 305, 91 L. Ed. 2d 249, 106 S. Ct. 2537 (1986)), and have interpreted the statute in light of 'the background of tort liability,' Monroe v. Pape, 365 U.S. 167, 187, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961)(overruled on other grounds), Monell v. New York City Dept. of Social Services, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)); *accord* Heck, supra, at 483. Our settled understanding of Section 1983 and the Seventh Amendment thus compel the conclusion that a suit for legal relief brought under the statute is an action at law.

526 U.S. at 709-10.

The Seventh Amendment right to trial by jury does not apply to suits decided by state courts. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 119 S.Ct. 1624, 1643, 143 L. Ed. 2d 882 (1999). This Court distinguished condemnation cases from Section 1983 cases in Del Monte Dunes by observing that ... "when government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due. Liability is not an issue." Id. Gisslen had no right to a jury trial on the public purpose determination phase of the condemnation proceedings.

In Del Monte Dunes this Court discussed the question of whether a jury trial of right was required in state condemnation proceedings when the landowner challenged whether the proposed taking is for public use. 526 U.S. at 713. This Court noted:

> The landowner who raises this issue, however, seeks not to establish the government's liability for damages, but to prevent the government from taking his property at all. As the dissent recognizes, the relief desired by a landowner making this contention is analogous not to damages but to an injunction; it should be no surprise, then, that the landowner is not entitled to a jury trial on his entitlement to a remedy that sounds not in law but in equity.

526 U.S. at 713.

Even if Gisslen raised constitutional objections to the taking of his property at the quick take stage in the state court, at most he would have been entitled to was injunctive relief, not damages. Del Monte Dunes, supra. The element of compensatory and punitive damages, available under Sections 1983, 1985 and 1986, would not have been addressed.

On the other hand, Gisslen was entitled to a jury trial on his Section 1983, 1985 and 1986 claims for determining liability as well as damages. The liability and damages determined under Section 1983 claims differs significantly from the limited issues of a condemnation proceeding. The condemnation damages addressed only the value of the property taken by the City. There was no right to jury trial on the taking of Gisslen's land by the City. The right to a jury trial in the condemnation case only occurred after the taking had been completed. This is per the statute and was acknowledged by Gisslen's condemnation attorney in an affidavit submitted to the district court. App. 32a. Gisslen had no right or opportunity to raise Section 1983 liability at the "liability" stage of the condemnation case to a jury. The condemnation statutes, as discussed, also afforded no right or opportunity for a jury to determine damages for Section 1983,

1985 and 1986 claims against other individuals not party to the condemnation. Application of Rooker-Feldman to Gisslen's Section 1983, 1985 and 1986 claims denied him his Seventh Amendment right to trial by jury for determination of liability and damages for his claims raised in federal court. The Eighth Circuit's discussion of evidence affecting the propriety and necessity of the taking likewise does not recognize that events germane to Gisslen's federal civil rights claims occurred **after** the quick take hearing on the condemnation petition. Gisslen had no way to determine the motivations of Joselyn, Dulgar and Mathisen that were based upon his exercise of free speech or with intent to deprive him of equal protection of the law. The City entertained a proposal by private developers on March 18, 1998 and June 2, 1998 for a town house development after the quick take hearing of March 13, 1998. App. 41-42a. The City sold land adjacent to Gisslen's after the condemnation not for a park, but to a private builder to construct someone else's dream home. Gisslen complained about illegal water pumping activities of the City after the condemnation. Gisslen could not have presented this evidence in his condemnation case. His constitutional claims were never subject to trial by jury in the state court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

Stephen Charles Fiebiger (#149664)
Counsel of Record
2500 West County Road 42, Suite 190
Burnsville, MN 55337
(952) 746-5171

Dated: February 3, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3859

[Filed November 6, 2003]

Brent Gisslen,	)
Appellant,	)
	)
v.	)
	)
City of Crystal, Minnesota, etc.,	)
et al.,	)
Appellees.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

/s/_____
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3859

[Filed September 26, 2003]

Brent Gisslen, Plaintiff - Appellant,	)
v.	)
City of Crystal, Minnesota, a municipality; E. Gary Joselyn, individually, and in his official capacities; Thomas A. Mathisen, individually and in his official capacities; Jerry Dulgar, individually, and in his official capacities, Defendants - Appellees.	)

Appeal from the United States District Court
for the District of Minnesota

Before MURPHY, JOHN R. GIBSON, and MELLOY, Circuit Judges.

OPINION

JOHN R. GIBSON, Circuit Judge.

Brent Gisslen appeals from an order of the district court[1] sustaining a motion to dismiss his complaint for lack of subject matter jurisdiction. Gisslen brought this action against the City of Crystal, Minnesota, the City Manager, the City Engineer, and a member of the City Council, asserting six civil rights claims under 42 U.S.C. §§ 1983, 1985, and 1986 for damages in connection with the condemnation of Gisslen's property. Gisslen argues that the district court erred in its determination that his claims are barred by the *Rooker-Feldman* doctrine. Because we conclude that the district court correctly applied the law, we affirm.

In 1984, Gisslen purchased a four-acre parcel of property in the City of Crystal, which includes most of a pond along with other land. Beginning in 1990, Gisslen and the City spent seven years engaged in numerous disputes involving his property. Their first encounter was a condemnation proceeding which resulted in the City obtaining a sewer easement on Gisslen's property. The City was required to maintain the easement. In August of 1991, the City dumped two loads of crushed asphalt on Gisslen's property line without his permission, and he voiced his complaint to City, regional, and state institutions. The City notified Gisslen that he needed to abate a hazardous building on his property, and told him to rebuild his front wall. The sewer easement caused the greatest number of disputes, including litigation, when

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[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

sediment built up in the pond as a result of the City's failure to properly maintain the sewer outlet emptying into the pond.

Meanwhile, the City expressed its interest in acquiring Gisslen's property. First, the City offered to buy the property for $100,000 in August of 1991. Next, in March of 1997, the City attempted to obtain a Natural Scenic Area Grant through the Minnesota Department of Natural Resources to purchase Gisslen's property. Four months later, the City notified Gisslen that it had not received the grant, but that the City Council was still interested in acquiring the property. Gisslen told the City, through his attorney, that he was not interested in selling his property to the City because he intended to build his family's "dream" home at the location. He alleges that the City wanted to acquire his property in retaliation for his complaints to various state and regional authorities about the City's conduct.

In November of 1997 and January of 1998, the City Council approved resolutions to obtain two parcels of Gisslen's property through eminent domain proceedings. The City indicated that it intended to use the property for park, natural resources, recreation, and open space purposes. Gisslen alleges that the City had no such intention, but that its goal was retaliation for Gisslen speaking out about the City's conduct. The City acted on these resolutions by commencing a condemnation action in Hennepin County District Court. The matter was heard on January 27, 1998. Gisslen appeared pro se at the hearing and introduced no evidence. The trial court found that the City had the authority to acquire the property, concluded that the taking was for a public use and purpose, and appointed three commissioners to ascertain and report the amount of damages due to Gisslen for the taking.

The Commissioners awarded Gisslen damages in the amount of $158,500. Gisslen appealed this award to the trial court and the City filed a cross-appeal. As Minnesota law provides, the trial court conducted a jury trial to determine the fair market value of the property. Gisslen was represented by counsel at trial, and the jury returned a verdict of $192,553. After the judgment was entered, the parties entered into a stipulation of settlement whereby the City agreed to pay Gisslen the amount of the verdict and his costs in exchange for Gisslen waiving his right to appeal the verdict. The City satisfied the judgment the following day.

Eleven months later, Gisslen filed this action. In it, he seeks actual and punitive damages for each of six counts; he alleges all defendants are liable for actual damages, and the individual defendants are liable for punitive damages. Gisslen asserts that the condemnation action was retaliation against him for speaking out on matters of public concern in violation of the First and Fourteenth Amendments to the Constitution; that the City condemned his property and not his adjoining neighbors' property because he objected to the City's conduct, and that this discrimination was in violation of his equal protection rights under the Fourteenth Amendment; that the condemnation resulted in denying him just compensation for the taking of his property in violation of the Fifth Amendment; that the condemnation action was hurriedly undertaken to prevent Gisslen from pursuing his legal rights against the City for its conduct with respect to his property, in violation of his substantive due process rights under the Fourteenth Amendment; that the individual defendants acted under color of state law to conspire to deprive Gisslen of his constitutional rights as alleged in the first four counts; and that all defendants neglected to prevent this conspiracy.

The City and its officials moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) or, alternatively, for summary judgment. The district court determined that any ruling it made on the claims would require it to invalidate the state court judgment, and that the claims were therefore precluded under the *Rooker-Feldman* doctrine. The district court granted the motion to dismiss, from which Gisslen appeals.

I.

The district court's determination that it lacked subject matter jurisdiction is an issue of law which we review de novo. *Charchenko v. City of Stillwater*, 47 F.3d 981, 982 (8th Cir. 1995). We apply the same standards as those used by the district court. *Grey v. Wilburn*, 270 F.3d 607, 608 (8th Cir. 2001).

The *Rooker-Feldman* doctrine provides that, "with the exception of habeas corpus petitions, lower federal courts lack subject matter jurisdiction over challenges to state court judgments." *Lemonds v. St. Louis County*, 222 F.3d 488, 492 (8th Cir. 2000) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923)). District courts have no authority to review state court decisions, "even if those challenges allege that the state court's action was unconstitutional," *Feldman*, 460 U.S. at 486, because "federal jurisdiction to review most state court judgments is vested exclusively in the United States Supreme Court," *Lemonds*, 222 F.3d at 492 (citations omitted).

Gisslen is not directly appealing the state court's judgment in the condemnation case, but the *Rooker-Feldman* doctrine

extends beyond "straightforward appeals . . . [to] more indirect attempts by federal plaintiffs to undermine state court decisions." *Id.* In other words, the state and federal claims need not be identical for the doctrine to apply. *See Goetzman v. Agribank, FCB (In re Goetzman)*, 91 F.3d 1173, 1177 (8th Cir. 1996). The doctrine thus precludes federal court jurisdiction over federal claims that are "inextricably intertwined" with claims of the state court action. *See Feldman*, 460 U.S. at 483 n. 16. A federal claim is inextricably intertwined if "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987) (Marshall, J., concurring).

Gisslen contends that the district court erred because his complaint is not a challenge to the state court decision as there were different claims for relief sought in the district court action. In the condemnation petition, the City sought ownership of Gisslen's property and a determination of what it must pay to Gisslen as fair compensation for the taking. Gisslen's federal complaint seeks damages for alleged constitutional violations arising out of the taking.

This distinction does not prevent us from concluding as a matter of law that the federal and state court actions are inextricably intertwined such that the *Rooker-Feldman* doctrine bars the district court from hearing Gisslen's claims. If Gisslen were to prevail in the district court, that would necessarily entail a ruling that the state court wrongly decided that: 1) the taking was in the public interest and/or; 2) Gisslen had been fairly compensated for the loss of his property. "Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues. . . are inextricably intertwined." *Silverman v. Silverman,* 338

F.3d 886, 893 (8th Cir. 2003) (en banc) (quoting *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001)); *see also Snider v. City of Excelsior Springs, Missouri*, 154 F.3d 809, 811-12 (8th Cir. 1998) (*Rooker-Feldman* bars suit where state court heard and decided condemnation action and federal court was being asked to order condemnation damages and reinstate property interests because requested relief would effectively void state court judgment).

Gisslen contends that the two cases are demonstrably different because he is seeking compensatory damages in the federal court action that were not available to him in the condemnation case, and his federal complaint does not ask for return of the property that the city acquired through eminent domain. While the relief requested in the two actions may be labeled differently, the reality is that Gisslen is asking the federal court for the same remedy requested in the state court action: just compensation. Contrary to Gisslen's assertion, he could have introduced evidence in the condemnation case concerning the effect of the City's management of the sewer easement on the value of his property.

> The general rule is that any evidence which legitimately bears upon the market value, either before or after the taking, including damage inflicted upon the part remaining, should be received. Where property is taken for public use in condemnation proceedings, any evidence is competent and any fact may properly be considered which legitimately bears on the market value of the property.

State v. Gannons Inc., 275 Minn. 14, 145 N.W.2d 321, 325-26 (Minn. 1966) (citations omitted).

Gisslen chose to proceed pro se in the condemnation case until after the commissioners entered their award. He offered no evidence before the trial court at the hearing on the petition or before the commissioners. When he did retain counsel and exercise his right to a jury trial on the issue of damages,[2] his attorney did not offer evidence of diminution in value as a result of the City's conduct. He did not seek to add parties to the action. Gisslen had the statutory right to do both. Minn. Stat. § 117.175 subd. 1 (2002).[3]

When the judgment was entered following the jury trial, Gisslen agreed to a settlement with the City in which he was immediately paid damages in the amount awarded by the jury and waived his right to appeal. Had he appealed, he could have pursued the same constitutional challenges which he asserted in his federal complaint. *See In re Minneapolis Cmty. Dev. Agency*, 439 N.W.2d 708, 710 (Minn. 1989); *Hous. & Redev. Auth. v. Minneapolis Metro. Co.*, 259 Minn. 1, 104 N.W.2d 864, 874 (Minn. 1960). His failure to do so precludes the district court from having jurisdiction over his

---

[2] Minn. Stat. § 117.165 subd. 1 (2002) ("In all eminent domain proceedings where an appeal is taken to the district court from the award of commissioners, the owner or the petitioner shall be entitled to jury trial.").

[3] The statute directs in relevant part that:

> Such appeal [from the award of commissioners] may be noticed for trial and tried . . . as in the case of a civil action and the court may direct that issues be framed, and require other parties to be joined and to plead therein when necessary for the proper determination of the questions involved.

complaint. This issue was squarely addressed by the Supreme Court in *Feldman*:

> [T]he fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States district court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims.

460 U.S. at 484 n.16 (citations omitted). Gisslen had the opportunity to raise his constitutional claims before the trial court and on appeal to the Minnesota Court of Appeals. Because he did not, the *Rooker-Feldman* doctrine prevents those claims from being brought in federal court. The doctrine does not apply exclusively to decisions from a state's highest appellate court of right, but also applies with equal force to decisions from a state trial court. *Charchenko*, 47 F.3d at 982, 983 n. 1 (*Rooker-Feldman* does not depend on final judgment on the merits, but applies where trial court dismissed action and plaintiff did not appeal). The district court did not err in dismissing the complaint because the claims it presented were inextricably intertwined with those of the state court action.

II.

Gisslen also contends that the district court erred in dismissing his complaint because the state and federal actions did not involve the same parties. Gisslen was a party defendant to the state court condemnation action, and the City

was the party plaintiff. The roles are reversed in this action, and Gisslen added three individual defendants who were not parties to the state court action.

Gisslen's contention does not change the analysis of the *Rooker-Feldman* doctrine. The controlling issue remains whether Gisslen has stated a claim that is inextricably intertwined with the state court case. Federal court jurisdiction is not determined by whether the parties are identical, but by whether the claims are sufficiently separate from those of the state court action. If the federal claims "so closely implicate the decision of the state court," the federal suit is barred even if Gisslen is not directly asking the district court to overturn the state court judgment. *Lemonds v. St. Louis County*, 222 F.3d 488, 493 (8th Cir. 2000). Gisslen was a party to both the state and federal actions, and he cannot disguise the similarity between the two by adding parties to the latter. In *Lemonds*, we held that the applicability of *Rooker-Feldman* does not depend upon the identity of the parties in the state and federal suits because the doctrine is rooted in federalism. 222 F.3d at 495. "[T]he lower federal courts. . . are simply without authority to review most state court judgments - regardless of who might request them to do so." *Id.*

Gisslen chose to proceed in the condemnation action without introducing evidence with respect to the propriety and necessity of the taking, and ultimately he waived his right to appeal the judgment. He thus failed to raise issues before the trial court that he could have raised and that the trial court would have had jurisdiction to decide. Gisslen cannot avoid the consequence of those choices by asking the district court to rule on matters that could have been a part of the condemnation case. The *Rooker-Feldman* doctrine, which

tests subject matter jurisdiction, is not discretionary. As we wrote in *Lemonds*:

> The key inquiry, as always, must be whether the federal plaintiff's interest in having a state rule set aside is inseparable from his interest in upsetting a particular state court judgment based on that rule.
>
> [T]here can be little doubt that both appellants had ample opportunity to bring their [constitutional] claims in state court. . . . Yet, rather than pursuing their claims before the state court, appellants awaited that court's adverse ruling before attempting to bring their substantively identical challenges in federal district court. This the *Rooker-Feldman* doctrine does not allow.

222 F.3d at 495-96 (citations omitted). The district court is without jurisdiction, and we affirm its judgment.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 00-1302 (MJD/JGL)

[Filed Nov. 7, 2001]

Brent Gisslen,	)
Plaintiff,	)
	)
v.	)
	)
City of Crystal, a municipality,	)
E. Gary Joselyn, individually	)
and in his official capacities;	)
Thomas A. Mathisen, individually	)
and in his official capacities;	)
and Jerry Dulgar; individually	)
and in his official capacities,	)
Defendants.	)
	)

MEMORANDUM AND ORDER

This matter is before the Court upon Defendants' Motion to Dismiss. In the underlying Complaint, Plaintiff alleges six causes of action against the City of Crystal and three city officials for civil rights violations arising out of a condemnation action adjudicated in state court. For the following reasons, the Court grants Defendants' Motion.

BACKGROUND

Plaintiff Brent Gisslen ("Gisslen") owned property at 6427 41st Avenue North in the City of Crystal. This property included, approximately four acres in the metro area, most of Hagemeister Pond, and a separate parcel extending from Douglas Avenue North in Crystal. Part of the land is located in a 100-year flood plain. Gisslen claims that he has suffered constitutional violations at the hands of the City of Crystal ("the City") and its officials E. Gary Joselyn ("Joselyn"), Thomas A. Mathisen ("Mathisen") and Jerry Dulgar ("Dulgar").

Gisslen asserts that his dispute began in 1990, when the City commenced condemnation proceedings for a sewer easement on his property. Ultimately, the City was granted a sewer easement and required to maintain it, and Gisslen was awarded $2,850.00 and the right to keep a fence on the property line. Then, in 1991, the City offered to purchase Plaintiff's property for $100,000. The City asserts that its offer was part of a comprehensive plan to create open space and protect natural resources by adding to the existing park system. Plaintiff did not accept that offer, although there is some indication that Plaintiff had asked for $2.00 per square foot.

Thereafter, between 1991 and 1996, Gisslen complained numerous times to the City, the Department of Natural Resources ("DNR"), the Minnesota Pollution Control Agency ("MPCA"), and the Board of Water and Soil Resources ("BWSR") about the City's failure to maintain the sewer easement on the property and Hagemeister Pond. Gisslen's complaints concerned litter dumping, illegal pumping, sediment deposits, disposal of crushed asphalt on the land, and flood plain building violations.

In 1996, Gisslen retained an attorney to assist him in pursuing his complaints against the City. Gisslen and his attorney met with Mathisen, the City Engineer, and others about the build-up of sediment in Hagemeister Pond. Gisslen asserts that Mathisen was belligerent toward him and used profanity during the meeting. Months later, Plaintiff and his attorney met with Mathisen and various state officials at Gisslen's property to assess the condition of the pond with respect to sediment build-up. According to Gisslen, both the MPCA and DNR notified the City that the failure to install a "riprap" or headwall at the sewer outlet had caused a significant sediment build-up, and the resulting erosion would damage the wetlands and possibly cause toxic soil development. Removal of the sediment would require a special permit. Although the City did not dredge or remove the sediment, soil boring testing and dredging negotiations continued into Fall 1997. Gisslen asserts that the City's failure to maintain and monitor the pond damaged his property and rendered it in a state of disrepair.

Also during this period, the City cited Gisslen for various infractions. In 1991, Gisslen began a grading project on his land after, he asserts, receiving approval from the City's Building Inspector. According to Gisslen, days later, Dulgar, the City Manager, visited the property and ordered Gisslen to stop the project immediately. Thereafter, the City Council "tabled" his request for a grading permit. In 1992, the City's Building Inspector cited Gisslen for failure to obtain a rental license in violation of the City's Housing Code. In 1997, the City ordered him to stop demolition of the house on his property until he had secured the building by boarding windows and doors, posting "no trespassing" signs, and fencing the property.

In 1996, Joselyn, a City Council Member and Gisslen's neighbor, identified Gisslen's property for acquisition by the City for a nature trail and passive area. Members of the City Park and Recreation Commission toured the property without Gisslen's permission, and developed a policy statement to acquire open space for park land. In 1997, the City applied for a DNR grant to develop the property as a "natural and scenic area," but the grant was denied. The City again offered to purchase Gisslen's property, and threatened condemnation proceedings if an agreement could not be reached. Gisslen, through his attorney, advised the City that he was not interested in selling his property to the City and that he had purchased the property to construct his family's "dream home."

In late 1997 and early 1998, the City, through its City Council, approved resolutions to take Gisslen's property by eminent domain proceedings. The City then commenced the condemnation action to take Gisslen's property, and the Honorable Phillip D. Bush heard the parties' arguments on the matter. On March 13, 1998, Judge Bush issued his Findings of Fact, Conclusions of Law, and Order Appointing Commissioners, which stated:

1. [The City] possesses the right of eminent domain and has properly exercised the same herein.

2. The taking of the fee simple title described in the petition, as amended, is for a public purpose, is necessary and convenient in furtherance of [the City's] plans to use the lands for park, recreation and open space purposes, and is such as is authorized by law.

See City of Crystal v. Brent A. Gisslen et al., No. CD-2478 (Henn. County Dist. Ct. Mar. 13, 1998). The Court also appointed three Commissioners to determine compensation for the condemnation of Gisslen's property. On November 13, 1998, the Commissioners filed an Award of Damages, which determined the value of Gisslen's property at $158,500. On December 18, 1998, Gisslen appealed the Commissioners' Award to the state district court. The City filed a cross appeal on December 23, 1998. As a result of a jury trial held between April 26-29, 1999, the jury determined that the fair market value of Gisslen's property was $192,553. On June 14, 1999, the City and Gisslen entered into a stipulation of settlement whereby the City paid the compensation amount determined by the jury in exchange for a waiver of Gisslen's right to appeal the damage award. Accordingly, the City satisfied the judgment on June 15, 1999. Sometime thereafter, the City purchased the lot directly adjacent to the east of Plaintiff's property. Gisslen asserts the City sold the land to private developers by bid and that a residential home was constructed on the lot in 2000. The City maintains that the property is being used, in part, for park purposes, and that it is involved in negotiating the acquisition of other properties surrounding Hagemeister Pond for the purpose of establishing a park.

Gisslen commenced the present action on May 25, 2000, seeking damages against the City and it officials for alleged civil rights violations stemming from the events related above. Specifically, Gisslen alleges violations of free speech, due process, equal protection, and just compensation: conspiracy to violate these rights: and failure to prevent the conspiracy to violate these rights pursuant to 42 U.S.C. §§ 1983, 1985, and 1986.

DISCUSSION

The Rooker-Feldman doctrine recognizes that, with the exception of habeas corpus petitions, lower federal courts lack subject matter jurisdiction over challenges to state court judgments. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413,416 (1923). This doctrine forecloses not only straightforward appeals, but also more indirect attempts by federal plaintiffs to undermine state court decisions. Lemonds v. St. Louis County, 222 F.3d 488, 492 (8th Cir. 2000). Indeed, the Rooker-Feldman doctrine prohibits federal courts from exercising jurisdiction over general constitutional claims that are "inextricably intertwined" with specific claims already adjudicated in state court. Id. A federal claim is inextricably intertwined with a state court judgment if the claim "succeeds only to the extent that the state court wrongly decided the issue before it [or] if the relief requested would effectively reverse the state court decision or void its ruling." Charchenko v. City of Stillwater, 47 F.3d 981,983 (8th Cir. 1995); see also Snider v. City of Excelsior Springs, Mo., 154 F.3d 809, 812 (8th Cir. 1998), The claims need not be identically named or pled, as "federal plaintiffs cannot by artful pleading obtain a hearing of disguised state court appeals that would otherwise be subject to a Rooker-Feldman bar." Lemonds, 222 F.2d at 494. Accordingly, deciding whether Rooker-Feldman controls this case "requires determining exactly what the state court held." Charchenko, 47 F.3d at 983.

Here, Gisslen brings his claims as free speech, due process, equal protection, and just compensation violations under federal statutes and seeks damages and attorneys' fees. As pled, however, his claims would essentially require this Court to find that the state court decided the condemnation

matter wrongly. In the Complaint, Gisslen alleges that Defendants retaliated against him for speaking out on matters of public concern (Count I), singled him out for the taking of his property (Count II), condemned his property "hurriedly" to prevent him from pursuing legal rights with respect to the sewer maintenance issues (Count IV), used eminent domain proceedings to avoid paying him just compensation (Count III), conspired to violate his rights (Count V), and neglected to prevent a conspiracy of violation of his rights (Count VI). Clearly, Gisslen is "reclothing" his challenge of the condemnation proceedings "in new constitutional garb." Lemonds, 222 F.2d at 494. As noted, the state court entered an order approving condemnation proceedings on Gisslen's property and appointing three Commissioners to determine the amount of compensation, if any, Gisslen was entitled to. The state court judgment specifically found that the taking of Gisslen's property was "for a public purpose, [was] necessary and convenient in furtherance of [the City's] plans to use the lands for park, recreation and open space purposes, and is such as is authorized by law." See See City of Crystal v. Brent A. Gisslen et al., No. CD-2478 (Henn. County Dist. Ct. Mar. 13, 1998). Any ruling on Gisslen's present claims would require this Court to invalidate the state court judgment, and otherwise address claims that are "inextricably intertwined" with that judgment. Indeed, this Court would be required to find that the taking of Gisslen's property was neither "for a public purpose," "necessary and convenient in furtherance of [the City's] plans to use the lands for park, recreation and open space purposes," nor "authorized by law." Rather, this Court would be required to find that the taking was in retaliation for Gisslen's complaints and for the purpose of avoiding paying him just compensation. This Court would be required to determine just compensation. Accordingly, the claims are precluded under Rooker-Feldman and this Court lacks subject matter jurisdiction.

CONCLUSION

Based on all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (Clerk Doc. No. 16) is **GRANTED** and Plaintiff's Complaint is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: Nov. 6, 2001

/s/_____
Michael J. Davis
United States District Court Judge

APPENDIX D

Case Type: Condemnation

STATE OF MINNESOTA	**DISTRICT COURT**
COUNTY OF HENNEPIN	**FOURTH JUDICIAL DISTRICT**

Court File No. CD-2478

[Filed March 13, 1998]

City of Crystal,
Petitioner,

vs.

Brent A. Gisslen; Renee D. Dempsey; City of Crystal; County of Hennepin; all other parties unknown having any right, title or interest in the premises herein together with unknown heirs or devisees, if any of the parties that may be deceased and including unknown spouses, if any,
Respondents.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER APPOINTING COMMISSIONERS

The above-entitled proceeding came on for hearing before the undersigned Judge of this Court in the Hennepin County Government Southdale Service Center, 7009 York Avenue South, Edina, Minnesota, on January 27, 1998, upon the petition of the City of Crystal, Minnesota ("City" or "Petitioner") for the taking of certain interests in real estate under the power of eminent domain.

Petitioner appeared by its attorneys, Robert J. Lindall of Kennedy & Graven, Chartered. The following respondents and their attorneys appeared:

Brent A. Gisslen, pro se.

There were no other appearances..

Having heard the evidence adduced at the hearing and the arguments of counsel, and based on all the files and records herein, the Court makes the following findings of fact, conclusions of law and order appointing commissioners:

FINDINGS OF FACT

1. Petitioner is a municipal corporation under the laws of the State of Minnesota. This proceeding is authorized by resolutions of petitioner's governing body passed on November 18, 1997, and January 6, 1998, certified copies of which are on file herein.

2. Petitioner seeks to acquire fee simple absolute title to the real estate described in Exhibit A attached to the petition, as amended and attached hereto ("Subject Property"), as against all persons or entities named in said Exhibit A and against all persons or entities unknown claiming any right, title estate, lien or interest in said real property.

3. As indicated in the proofs of service that have been filed in the office of the Administrator of District Court, notice of the objects of the petition and of the time and place of presenting the same was duly and timely served upon all of the respondents named in the petition, as amended.

2. The acquisition of the interests in real estate to be acquired is authorized by Minnesota Statutes, Chapter 117.

3. The lands to be taken and acquired are situated in the City of Crystal, County of Hennepin, State of Minnesota, and are described in the petition, as amended.

CONCLUSIONS OF LAW

1. Petitioner possesses the right of eminent domain and has properly exercised the same herein.

2. The taking of the fee simple title described in the petition, as amended, is for a public use and purpose, is necessary and convenient in furtherance of petitioner's plans to use the lands for park, recreation and open space purposes, and is such as is authorized by law.

WHEREFORE, the Court makes the following:

ORDER APPOINTING COMMISSIONERS

IT IS HEREBY ORDERED THAT Marilyn J. Michales, Lee D. Peterson and Ellen B. Herman are hereby appointed as commissioners, all being residents of the County of Hennepin, to ascertain and report the amount of damages, if any, that will be sustained by the parties named as having an interest in the subject properties as described in Exhibit A to the petition, as amended, herein.

Said commissioners shall be paid and shall undertake their duties in accordance with law and the special "Policy on Condemnation Proceedings", a copy of which is attached hereto. None and None, also residents of Hennepin County, are hereby appointed as alternate commissioners, in the event any of the original commissioners are unable to serve. The above-named commissioners shall meet on April 8, 1998, at 9:00 a.m. at the Civil Intake Desk on the second floor of the Hennepin County Government Center, for the purpose of taking the oath of commissioners. The above-named commissioners shall file their award of damages as to the Subject Property no later than 180 days from the date of this Order.

IT IS FURTHER ORDERED:

1. That the estate acquired by the petitioner in the Subject Property shall be fee simple absolute title in and to those lands as described in Exhibit A to the petition herein, as amended.

2. The fee simple title to be acquired herein is taken absolutely and subject to no other interests, except the reservation by the State of Minnesota of mineral rights as to Parcel B pursuant to Deed Document No. 2138517 in favor of Brent Gisslen, as grantee.

3. Except as provided in Paragraph 2 hereof, this Order is effective with respect to all parties listed on Exhibit A attached to the Petition herein, as amended.

Dated: 3/13, 1998. BY THE COURT:

/s/_____

Philip D. Bush
Judge of the District Court

APPENDIX E

Case Type: Condemnation

STATE OF MINNESOTA	**DISTRICT COURT**
COUNTY OF HENNEPIN	**FOURTH JUDICIAL DISTRICT**

Court File No. CD-2478

[Filed Nov. 13, 1998]

City of Crystal,
Petitioner,

vs.

Brent A. Gisslen; Renee D. Dempsey; City of Crystal; County of Hennepin; all other parties unknown having any right, title or interest in the premises herein together with unknown heirs or devisees, if any of the parties that may be deceased and including unknown spouses, if any,
Respondents.

AWARD OF COMMISSIONERS

PARCELS A AND B

TO: THE ABOVE-NAMED RESPONDENTS

The undersigned Commissioners, appointed by the above-named Court, having qualified according to law, hereby make the following award of damages with respect to the Petitioner's taking of the Subject Property in the above-captioned matter:

TO:

Brent A. Gisslen	$ 158,500
Renee D. Dempsey	
City of Crystal	
County of Hennepin	

TO:

Barbara Ann Halliday	None
State of Minnesota	None
All other parties unknown having any right, title, or interest in the real estate described herein, together with unknown heirs or devisees and spouses, if any.	None

---

We further report that each of the undersigned Commissioners viewed said real estate, that a hearing was held at which the opportunity to present evidence was provided, and that all the undersigned participated in hearing

testimony of those interested parties who appeared at said hearing, and participated in ascertaining and determining the above-stated award.

The Petitioner shall reimburse Respondent Brent A. Gisslen in the amount of $1,000 incurred by respondent as appraisal fees.

Dated: November 12, 1998.

/s/_____
Marilyn Michales, Commissioner

/s/_____
Lee Peterson, Commissioner

/s/_____
Kevin T. Meeks, Commissioner

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

Court File No. CD-2478

DISTRICT COURT)
Petitioner,)
)
vs.)
)
Brent A. Gisslen and)
Renee D. Dempsey,)
Respondent.)
)

We, the jury impaneled in the above-entitled matter make the following answers to the following questions put to us by the court:

1. What is the fair market of the property taken on November 13, 1998?

$ 192,553.00

Dated at Hennepin County, Minnesota this 29th day of April, 1999.

/s/ Joan K. Scott
Foreperson

NOTE: If the verdict is unanimous, only the foreperson need sign this form. When, after six hours of deliberation, 6 of 7 jurors agree to the verdict, the 6 agreeing sign below:

Concurring jurors:

_____ _____

_____ _____

_____ _____

This verdict was agreed upon at the hour of __1__ o'clock p.m., on the _29th_ day of April, 1999.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No: 00-1302 (MJD/JGL)

Brent Gisslen,
Plaintiff,

v.

City of Crystal, a municipality;
E. Gary Joselyn, individually
and in his official capacity;
Thomas A. Mathisen, individually
and in his official capacity;
and Jerry Dulgar, individually
and in his official capacity,
Defendants.

AFFIDAVIT OF PATRICK NEATON

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

Patrick Neaton, being first duly sworn, hereby deposes and states upon oath as follows:

1. I am an attorney licensed to practice law in the State of Minnesota and have litigated condemnation cases. I represented Brent Gisslen, plaintiff in the above matter, at trial of Mr. Gisslen's eminent domain proceeding in Hennepin County District Court in 1999 brought by the City of Crystal.

2. The case was tried to a jury before the Honorable Phillip Bush, Judge of District Court, Fourth Judicial District, State of Minnesota. The trial came after Mr. Gisslen appealed the award of the commissioners and the City cross-appealed the award. I did not represent Mr. Gisslen at any stage of the proceedings before the commissioners. I was engaged to represent Mr. Gisslen after the commissioners' decision was appealed to try the case for him in District Court. The appeals are only available from the monetary award, or omission of an award, by the commissioners in their report by Minn. Stat. Section 117.145. I am aware of no statutory provision under condemnation law for a jury trial to determine whether the purpose for the taking presented by the petitioner is legitimate or for the reason given in the petition.

3. The trial in District Court involved no constitutional claims or claims for violations of Mr. Gisslen's federal civil rights under 42 U.S.C. Sections 1983, 1985, or 1986 for deprivations of free speech, substantive due process, unjust compensation by diminution in proper value, or equal protection.

4. The parties to the condemnation proceeding were the City of Crystal as the petitioners and Mr. Gisslen and his wife, as the Respondents. There were no individuals from the City of Crystal as parties to the case. Specifically, E. Gary Joselyn, Thomas A. Mathisen and Jerry Dulgar were not parties to the condemnation case at any time in either an individual or official capacity. None of these three

participated in the condemnation case nor testified at trial. No issues involving Mr. Gisslen's complaints to the City about its neglect of the sanitary sewer easement, causing sediment build up in Hagemeister Pond, improper pumping between the Shingle Creek and Basset Creek Watershed Districts, retaliation, or conclusions and actions of various agencies, such as the Department of Natural Resources, Minnesota Pollution Control Agency, or Board of Water and Soil resources, were addressed in the condemnation case. Likewise Mr. Gisslen's past disputes with the City were not addressed.

5. The condemnation case did not address compensatory damages to Mr. Gisslen for compensatory damages for pain and suffering, mental anguish or humiliation, diminution in the value of the property for violation of constitutional rights, or for punitive damages. These damages are not typically a component of relief in condemnation cases.

6. In 1999, the City dumped street sweepings onto Mr. Gisslen's property at the location where his former house once stood at 6427 41st Avenue North in Crystal. This was visible. Because it was set near the Pond it may have presented a leeching concern. I thought this conduct was unusual and inconsistent with the City's position that they wanted his property for use as a park. The street sweepings were dirty and contained sand and salt.

7. At the condemnation trial, conducted by Judge Bush, issues of the City's purpose for taking the property were not at issue. Likewise, any ulterior or improper motives of the City, or its officials, or constitutional violations, were not addressed in the case nor tried to a jury. The trial focused on the fair market value of the property in its condition at the time. Mr. Gisslen wanted to build on the property to enhance

its value. The City took the position that Mr. Gisslen's property could not be used for a Planned Unit Development (PUD). In our appraiser's view, the property was ideal for a PUD, for multiple housing, which would have increased the value of the property.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/_____
Patrick Neaton

Subscribed and sworn to before me
this 20th day of April, 2001.

/s/ Lori B. Nolin
Notary Public

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No: 00-1302 (MJD/JGL)

Brent Gisslen,	)
Plaintiff,	)
	)
v.	)
	)
City of Crystal, a municipality;	)
E. Gary Joselyn, individually	)
and in his official capacities;	)
Thomas A. Mathisen, individually	)
and in his official capacities;	)
and Jerry Dulgar, individually	)
and in his official capacities,	)
Defendants.	)
	)

AFFIDAVIT OF BRENT GISSLEN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Brent Gisslen, being first duly sworn, hereby deposes and states upon oath as follows:

1. That I am the Plaintiff in the above-matter and submit this Affidavit in opposition to Defendants' motion to dismiss and for summary judgment. I purchased the property at 6427 41st Avenue North in Crystal in 1984 from the Hagemeister family. The property comprised approximately four acres in the metro area and included most of Hagemeister Pond and extending to 41st Avenue North in Crystal. This is Parcel A attached to the Complaint. I obtained Parcel B, a land-locked property, separately. At the time I purchased the Hagemeister property in 1984, the property was not part of the City's 1980 Comprehensive Plan for open space or park. The City made no effort in 1984 to buy or otherwise obtain this property for park or open space purposes. There was an existing structure at the time I bought the property which I eventually planned to remove and replace with my dream home.

2. Attached hereto a true and correct copy of a letter of July 7, 1989 from William Monk to me as Exhibit 1.

3. Attached hereto is a true and correct copy of a letter of October 16, 1989 from William Monk to me as Exhibit 2,

4. Attached hereto is a true and correct copy of a letter of April 17, 1990 from William Monk to me as Exhibit 3.

5. Attached hereto is a true and correct copy of the City's 1990 sewer easement petition as Exhibit 4. The City sought to install a drainage sewer to channel runoff from other ponds higher up in the system into Hagemeister Pond.

6. Attached hereto is a true and correct copy of the order for the sewer easement of January 3, 1991 as Exhibit 5.

7. I made a complaint to the City and Hennepin County Department of Environmental Management over the City's depositing hazardous asphalt, in September of 1991. I attach a true and correct copy as Exhibit 6.

8. Attached hereto is a true and correct copy of a letter of September 17, 1991 from me to the Shingle Creek Watershed and Defendant Dulgar as Exhibit 7.

9. A true and correct copy of a memo of September 30, from Monk to Dulgar is attached hereto as Exhibit 8.

10. Attached hereto is a true and correct copy of a letter of October 21,1991 from Dale Claridge, consulting engineers for the Shingle Creek Watershed District, as Exhibit 9.

11. Attached hereto as Exhibit 10 is a true and correct copy of a letter of October 23, 1991 from John Linc Stine of the DNR regarding Hagemeister Pond and improper pumping.

12. Attached hereto as Exhibit 11 is a true and correct copy of a memo of October 30, 1991 from the City's building inspector, William Barber and engineer Monk to Jerry Dulgar regarding my property

13. Attached hereto as Exhibit 12 is a true and correct copy of a letter of June 29, 1992 from Lanny Peissig of the Minnesota Pollution Control Agency to Mr. Monk.

14. Attached hereto as Exhibit 13 is a true and correct copy of the Jury Verdict in my favor against the City in 1993 for interfering with contract for damages of $2,330.00.

15. Attached hereto is a true and correct copy of a letter dated October 24, 1996 of David Johnson of the Board of Water and Soil Resources as Exhibit 14.

16. Attached hereto is a true and correct copy of a letter of November 12, 1996 from Judy Mader of the Minnesota Pollution Control Agency (MPCA) as Exhibit 15.

17. The City was aware of the state of disrepair of Hagemeister Pond and failed to maintain it the same as the upper ponds in the City's Flood Control System which were dredged, thereby causing more damage to my property. The City had not undertaken the same dredging of my Pond.

18. Attached hereto is a true and correct copy of a letter of October 28, 1996 from Tom Hovey of the Minnesota Department of Natural resources (DNR) as Exhibit 16.

19. Attached hereto as Exhibit 17 is a true and correct copy of a letter of February 5, 1997 from Bruce Sandstrorn, Metro Region Supervisor for the DNR John Linc Stine, Permits and Land Use Section of DNR, regarding permit requirements.

20. I planned to build my dream home on my property and had begun demolition of the existing structure on the site. The City was aware of this as I had obtained a demolition permit from the City to remove the structure. This part of the property was located away from the wetlands area of Hagemeister Pond and the 100-year flood plain. The building site for my new home was near the passing street, 41st Avenue North. This would be near where a new home was recently constructed next door at 6403 41st Avenue North.

21. Attached hereto as Exhibit 18 is a true and correct copy of a letter of July 2, 1997 of Assistant City Manager Anne Norris to me.

22. Attached hereto as Exhibit 19 is a true and correct copy of a newspaper article from March of 1998 from the Crystal/Robbinsdale Sun Post.

23. Attached hereto as Exhibit 20 is a true and correct copy of a May 29, 1998 meeting Notice issued by the Crystal City Clerk regarding a meeting at City Hall on June 2, 1998 to review development plans.

23. Attached hereto as Exhibit 21 is a true and correct copy of a letter of August 29, 2000 from Tom Hovey of the DNR to the City's Utilities Superintendent John Hill regarding continued auxiliary pumping between the Shingle Creek and Bassett Creek Watershed Districts by the City.

24. After acquiring all of my property by condemnation, purportedly for a park, the City acquired the lot at 6403 41st Avenue North adjacent to my former property. Instead of leaving the property open for use as a park, the City sold the property to a private developer and permitted construction of a brand new single-family home in 2000 - 2001. The home is located towards the front of the lot by 41st Avenue North, away from the wetlands and floodplain. I planned to build my dream home in a similar manner before my property was taken. Attached hereto as Exhibit 22 are true and correct copies of documents from the Hennepin County Recorder's Office reflecting the City's transactions for the property at 6403 41st Avenue North.

25. That at the state condemnation proceedings I did not knowlingly or voluntarily waive my right to a trial by jury on

any constitutional violations by Defendants City, Joselyn, Mathisen and Dulgar. These individuals were not parties to the condemnation case. No federal civil rights claims for constitutional deprivation of my rights to free speech under the first amendment, equal protection and substantive due process under the fourteenth amendment or diminution in value under the fifth amendment were litigated. Likewise, no causes of action under 42 U.S.C. section 1983, 1985 and 1986 were litigated in the state condemnation case.

26. That I have reviewed the Complaint filed May 25, 2000 and hereby verify the truth of the allegations contained therein based upon my own knowledge and, as to those matters based upon information and belief, believe them to be true.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/_____
Brent Gisslen

Subscribed and sworn to before me
this 30th day of April, 2001.

/s/Stephen C. Fiebiger
Notary Public

APPENDIX H

May 29, 1998

NOTICE!!!

NOTICE IS HEREBY GIVEN, that the Crystal City Council will conduct a work session immediately following the regular city council meeting of June 2, 1998. The following items will be discussed:

1. Proposal for development of townhouses at 6427 - 41st Avenue North.

2. Proposal for Douglas Court Apartments, 2701 - 27th Avenue North.

The work session will be held at the Crystal Municipal Building, 4141 Douglas Drive.

Auxiliary aids for handicap persons are available for the public meetings upon request at least 96 hours in advance. Please call the City Clerk at 531-1000 to make arrangements. (TDD 531-1049)

City Clerk
City of Crystal

CRYSTAL CITY COUNCIL
WORK SESSION AGENDA
June 2, 1998

Pursuant to due call and notice given in the manner prescribed by Section 3.01 of the City Charter, a Work Session of the Crystal City Council was held at 8:30 p.m., on June 2, 1998, at 4141 Douglas Drive, Crystal, Minnesota.

Councilmembers	Staff
✓ Anderson	✓ Dulgar
✓ Grimes	✓ Bubul
✓ Hoffman	____ Mathisen
✓ Joselyn	✓ Norris
✓ Krueger	____ George
____ Thonander	
✓ Meintsma	

1. The City Council discussed a proposal for townhouses on property located at 6427 – 41st Avenue North.

2. The City Council discussed a developer's proposal for the Douglas Court Apartments.

Work session adjourned at 9:13 (Joselyn) p.m.

APPENDIX I

42 U.S.C. Section 1983
Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Section 1985
Conspiracy to interfere with civil rights, in relevant part:

(3) Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to

prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more conspirators.

42 U.S.C. Section 1986
Neglect to prevent conspiracy

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no

widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

28 U.S.C. Section 1343
Civil rights and elective franchise, in relevant part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recovery damages for injury to is person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(2)

Supreme Court, U.S.
FILED
APR 2 3 2004
OFFICE OF THE CLERK

No. 03-1141

In the Supreme Court of the United States

BRENT GISSLEN,

Petitioner,

v.

CITY OF CRYSTAL, MINNESOTA, a municipality, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR REHEARING

STEPHEN CHARLES FIEBIGER
Counsel of Record

2500 WEST COUNTY ROAD 42
SUITE 190
BURNSVILLE, MN 55337
(952) 746-5171

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioner hereby moves, pursuant to Rule 44.2 of the Supreme Court Rules, for rehearing on his petition for writ of certiorari. In support thereof, Petitioner makes the following arguments: intervening decisional caselaw by sister Circuit Courts conflict with the Eighth Circuit's decision in this case regarding the standard for determining when a state decision is "inextricably intertwined" under the Rooker-Feldman analysis to deprive federal courts of subject matter jurisdiction in causes of action under 42 U.S.C. Sections 1983, 1985 and 1986. In addition, the Eighth Circuit issued Johnson v. City of Shorewood, 360 F.3d 810 (8th Cir. 2004), on March 5, 2004, relying upon the Gisslen holding that the plaintiffs were seeking the same remedy in state court as in federal court: just compensation. Gisslen, however, sought compensatory damages in federal court for constitutional violations of free speech, equal protection and substantive due process as well as punitive damages. This also conflicts with the Eighth Circuit's suggestion that Gisslen could, and should, have added his new Section 1983, 1985 and 1986 claims and added Joselyn, Dulgar and Mathisen as parties in the state court case. This Court needs to clarify and articulate a uniform Rooker-Feldman analysis so that plaintiffs such as Gisslen, with viable federal claims, are afforded the jurisdiction of the federal courts when they have had no prior opportunity to raise their claims.

REASONS FOR GRANTING THE PETITION FOR REHEARING

1. Intervening and Conflicting Decisions by Sister Circuits Continue to Apply Inconsistent Criteria for Denying Subject-Matter Jurisdiction Under Rooker-Feldman.

A. "Inextricably intertwined" inexplicably applied inconsistently.

Since Gisslen filed his petition for a writ of certiorari on February 4, 2004, a number of other Circuit Courts of Appeals have applied the Rooker-Feldman doctrine in a conflicting and inconsistent manner that results in some plaintiffs being denied their day in court for lack of subject-matter jurisdiction and others allowed to proceed. Rehearing in this case is necessary to plug the hole in the bursting dyke of inconsistency among lower federal courts interpreting Rooker-Feldman. Construction of federal law and application of Rooker-Feldman for federal subject-matter jurisdiction should be uniform among the Circuits but it is not. Because the Circuit Courts of Appeals continue to apply Rooker-Feldman inconsistently it is incumbent upon this Court to resolve the conflicts and clarify a uniform standard if it continues to be applied.

On February 6, 2004, the Tenth Circuit held in Pittsburg County v. City of McAlester, et al, 358 F.3d 694 (10th Cir. 2004), that the Rooker-Feldman jurisdictional bar has been applied to two categories of claims, those: (1) actually decided by a state court, or (2) "inextricably intertwined" with a state court judgment. Id at 707. To apply the "inextricably intertwined" standard, the Tenth Circuit inquired "whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." Id; (Quoting from Gary v.

Geils, 82 F. 2d 1362, 1365 (7th Cir. 1996)). The Tenth Circuit addressed whether the state-court judgment caused, actually or proximately, the injury for which the federal plaintiff seeks redress. Id; Kenman Eng'g v. City of Union, 314 F. 3d 468, 476 (10th Cir. 2002). If it did, Rooker-Feldman deprives the federal court of jurisdiction; if it did not, Rooker-Feldman provides no bar. Pittsburg County, 358 F.3d at 707.

This approach differs significantly from the Eighth Circuit's analysis for Gisslen. Applying the Tenth Circuit's approach to Gisslen shows great disparity from the Eighth Circuit's use of Rooker-Feldman. Under the first prong, Gisslen's federal civil rights violations were not actually decided by the state court. Next, Gisslen's Section 1983, 1985 and 1986 claims against individuals Joselyn, Dulgar and Mathisen would not have resulted from the state court condemnation judgment itself and are distinct from the judgment. It would have been impossible for Gisslen to allege in the condemnation case that Joselyn, Dulgar and Mathisen violated his federal civil rights by a condemnation judgment that had not been entered. His federal complaint does not seek to invalidate the state court judgment. Gisslen has not requested that the condemnation judgment be changed. The remedies for Section 1983, 1985 and 1986 claims including compensatory damages, emotional distress, and punitive damages, were not available in the state condemnation case. Eminent domain damages were solely limited to the value of the property taken from Gisslen by the City and did not cover the panoply of compensatory damages for constitutional violations. Unfinished condemnation proceedings were not the proper forum for Gisslen's constitutional claims. Gisslen's injuries from Joselyn, Mathisen and Dulgar could not have resulted from the condemnation judgment itself if he were required to add his

constitutional claims against them in the state case as suggested by the Eighth Circuit. Such a requirement is not part of the inextricably intertwined analysis of the Tenth Circuit.

The Tenth Circuit subsequently looked at the "inextricably intertwined" test of Rooker-Feldman again in Merrill Lynch Business Financial Services, Inc. v. Nudell, 2004 U.S. App. LEXIS 7063 (April 12, 2004). To discern whether the "inextricably intertwined" standard applied, the Court asked:

> whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment. Three related concepts – injury, causation, and redressability – inform this analysis. In other words, we approach the question by asking whether the state-court judgment caused, actually and proximately, the injury for which the federal- court plaintiff seeks redress. Kenman Eng., 314 F. 3d at 476 (internal citations and quotations omitted).

Merrill Lynch at *7-8.

Under Pittsburg County, a dismissal on the merits does not trigger application of the inextricably intertwined test. Merrill Lynch, at*8; Pittsburg County, 358 F. 3d at 707 (holding that because the state court did not reach the plaintiff's federal claims on the merits, the federal "claims do not result from the state court judgments dismissing [them]"). Thus, the "inextricably intertwined" test is not satisfied when a federal plaintiff brings claims that the state court did not review on the merits. Merrill Lynch, at *8; Pittsburg County, at 708 n.3.

In between Pittsburg County and Merrill Lynch the Ninth Circuit handed down Kougasian v. TMSL, Inc., 359 F. 3d 1136 (9th Cir. 2004), once more articulating its view of the

"inextricably intertwined" analysis. The Ninth Circuit recognized the disparity of how its sister circuits have interpreted the "inextricably intertwined" language of Rooker-Feldman more broadly. Kougasian, supra; *see e.g.*, Moccio v. New York State Office of Court Admin., 95 F.3d 195, 199-200 (2d Cir. 1996)("We agree that the Supreme Court's use of 'inextricably intertwined' means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding (as either the plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under the principles or preclusion."); Wang v. New Hampshire Bd. of Registration in Med., 55 F.3d 698, 703 (1st Cir. 1995)(dismissing due process challenge to revocation of a medical license as inextricably intertwined with a state court judgment affirming revocation of the license on the merits); *see also* Bechtold v. City of Rosemount, 104 F.3d 1062, 1065-66 (8th Cir. 1997). According to the Ninth Circuit, "[s]uch a broad meaning of the phrase "inextricably intertwined", however, is not warranted by the Supreme Court's decision in Feldman, where the phrase originated. Kougasian, supra. Nor is it warranted by the function of the Rooker-Feldman doctrine in our federal system. Id.

B. Legal Wrong Caused by Adverse Party Does Not Trigger Rooker-Feldman

The premise for the operation of the "inextricably intertwined" test in Feldman is that the federal plaintiff is seeking to bring a forbidden de facto appeal. Noel v. Hall, 341 F.3d 1148, 1158 (9th Cir. 2003). Where a federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, Rooker-Feldman does not bar jurisdiction. Id at 1163. In Kougasian, the Ninth Circuit explained its

rationale behind why the inextricably intertwined test does not prevent a federal plaintiff from ever raising issues and claims not raised in state courts:

> But the "inextricably intertwined" test does not mean that a federal plaintiff can never raise issues that are "inextricably intertwined" with issues already decided in completed state court litigation. If that were so, Rooker-Feldman would give greater preclusive effect to state court judgments than the states themselves would give those judgments. Such super-preclusive effect would violate the requirement of 28 U.S.C. Section 1738 that federal courts give the same (not more or less) preclusive effect the rendering state courts would give to those judgments. *See, e.g.* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 72 L.Ed. 2s 262, 102 S.Ct. 1883 (1982); Noel, 341 F.3d at 1160. Similarly, if the "inextricably intertwined" test means that a federal plaintiff cannot raise issues in simultaneous ongoing state court litigation, Rooker-Feldman would prevent the parallel state and federal litigation that is one of the hallmarks of our federal system. *See, e.g.*, Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 295, 26 L.Ed. 2d 2354, 90 S.Ct. 1739 (1970); Green v. City of Tuscon, 255 F.3d 1086, 1097-98 (9th Cir. 2001)(en banc); Noel, 341 F.3d at 1159.

Gisslen asserted legal wrongs against Joselyn, Dulgar and Mathisen, as well as the City, based upon violation of federal laws, not state condemnation statutes. The state court did not address or decide any federal issues or claims between the City and Gisslen. Joselyn, Dulgar and Mathisen were not parties to the condemnation case and had no interest in Gisslen's property or determination of its value. Their motivations towards Gisslen were never litigated nor did a

reasonable opportunity to do so exist. Gisslen's claims that they violated his federal civil rights was not germane to the condemnation case.

Some significant facts supporting Gisslen's Section 1983, 1985 and 1986 claims arose after the taking portion and appeal of the commissioner's award in the condemnation proceedings and were never part of that case. For example, Gisslen continued to complain about illegal pumping of water by the City between watershed districts, the City entertained a proposal by developers at the Gisslen land site for town homes, the City's sale of adjacent land to private developers for use other than park and open space, and depositing of street sweepings on Gisslen's property. These events occurred **after** the taking of Gisslen's property as determined by the state district court. Liability of the City for the taking was already established without the benefit of a jury trial. Under Rooker-Feldman, these claims could not result in invalidating the state court judgment. The district court, and Eighth Circuit, unfortunately, simply lumped them all together and focused exclusively on the state condemnation case. Gisslen's case is more akin to the Ninth Circuit's analysis in Kougasian v. TMSL, Inc., 359 F. 3d 1136 (9th Cir. 2004), because his federal complaint raised civil rights claims against adverse parties with no interest in the state case.

The Eighth Circuit apparently recognized that Gisslen's claims against Joselyn, Dulgar and Mathisen focused upon legal wrongs committed by them against Gisslen, instead of an allegation that he was wronged by an erroneous decision of the state court. This could explain why the Eighth Circuit went to the bother of determining, without any supporting caselaw, that Gisslen could have added his Section 1983, 1985 and 1986 claims against Joselyn, Dulgar and Mathisen in the condemnation case. Rooker-Feldman, however, does

not come into play when the federal claim asserts a wrong caused by an adverse party rather than by the state court judgment. Under the Ninth Circuit's analysis of Rooker-Feldman, subject-matter jurisdiction in federal court is not lost when the federal plaintiff is not complaining of legal injury caused by a state court judgment. *See* Kougasian; Noel v. Hall, 341 F.3d 1148 (9th Cir. 2003).

The ability of a plaintiff to bring claims for 42 U.S.C. Sections 1983, 1985 and 1986 for a legal wrong by an adverse party should not vary depending on the Circuit in which the federal district court sits. The court's original jurisdiction allows federal civil rights claims in federal court for legal wrongs and compensatory and punitive damages caused by the adverse parties named, including the City, Joselyn, Dulgar and Mathisen.

On March 5, 2004, the Eighth Circuit again applied Rooker-Feldman to bar subject-matter jurisdiction in Johnson v. City of Shorewood, et al, 360 F.3d 810 (8th Cir. 2004). Citing Gisslen, the Court held that Rooker-Feldman barred subject-matter jurisdiction of the federal court because the Johnsons were essentially challenging the state judgment as inadequate and were "asking the federal court for the same remedy requested in the state court action: just compensation". Again, this misstates Gisslen's federal Complaint that alleged, *inter alia*, violations of 42 U.S.C. Sections 1983, 1985, and 1986 for free speech, equal protection, substantive due process, conspiracy and neglect to prevent conspiracy, seeking compensatory and punitive damages.

The Third Circuit took a rudimentary approach to Rooker-Feldman in Exxon Mobil Corp. v. Saudi Basic Industries Corp., 2004 U.S. LEXIS 5485 (3d Cir. 2004), decided March 24, 2004, denying subject-matter jurisdiction when the same

claims were brought in the federal action. The Seventh Circuit rejected Rooker-Feldman in Garcia v. Village of Mount Prospect, et al, 360 F.3d 630 (7th Cir. 2004), decided February 23, 2004, and, instead applied res judicata. In Garcia, the district court dismissed the case for lack of subject-matter jurisdiction under Rooker-Feldman. The Seventh Circuit held that the plaintiff had a full and fair opportunity to litigate his federal civil rights claims under Title VII, and 42 U.S.C. Sections 1981 and 1983, because the state court could have exercised jurisdiction over his federal civil rights claims either directly or after plaintiff exhausted his administrative review from a police pension board's denial of benefits and joined the claims in state court. In rejecting Rooker-Feldman, the Seventh Circuit noted that the plaintiff's injury was not caused by the state-court judgment. Garcia, supra, n.5. Gisslen was denied a reasonable opportunity to litigate his federal claims.

The Supreme Court has never, outside of Rooker and Feldman themselves, employed the doctrine to hold that a federal district court is without subject matter jurisdiction. Noel, at 1158-59. The Court has barely discussed the doctrine since its decision in Feldman, although in three later cases it has held that the doctrine does not apply. Id; *see* Verizon Maryland, Inc. v. Public Service Commission, 535 U.S. 635, 644 n. 3, 152 L.Ed. 2d 871, 122 S.Ct. 1753 (2002)(holding Rooker-Feldman does not apply to a suit in which review is sought in federal district court of "executive action, including determinations made by a state administrative agency"); Johnson v. DeGrandy, 512 U.S. 997, 1006, 129 L.Ed. 2d 775, 114 S.Ct. 2647 (1994)(Rooker-Feldman does not apply to a federal court suit brought by a non-party to the state court suit); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 95 L.Ed.2d 1, 107 S.Ct. 1519 (1987)(Court did not dismiss for lack of jurisdiction, but rather abstained

under Younger v. Harris)(Scalia, J., concurring)("I do not believe the so-called Rooker-Feldman doctrine deprives the Court of jurisdiction...."). Instead of applying Rooker-Feldman full steam as some Circuit Courts have done to deprive lower courts of subject matter jurisdiction, this Court has applied the doctrine sparingly. The Court should review this case to instill the same approach for all federal Circuit Courts and district courts.

Plaintiffs alleging violations of federal civil rights pursuant to 42 U.S.C. Sections 1983, 1985 and 1986 against new parties in order to obtain relief and damages not available in a state court case, and not seeking to change the state court judgment, should have the benefit of the subject matter jurisdiction of the federal courts. Denying Gisslen's federal claims subject-matter jurisdiction in federal court deprives him of his Seventh Amendment right to trial by jury on liability and damages as well as remedies and damages not available in the state condemnation proceeding. Rooker-Feldman was fashioned to prevent de facto appeals of unfavorable state court judgments, not to deprive plaintiffs of their day in federal court for legitimate claims not available in the state court case. Rooker-Feldman has become a sword to destroy the right to litigate viable claims in federal court. Plaintiffs should receive their Seventh Amendment right to trial by jury in federal court for damages claims. Cases should be decided on their merits and the federal court s open to all citizens. This Court should now resolve the continuing inconsistencies and conflicting application of Rooker-Feldman among the Circuit Courts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this honorable Court grant his petition for rehearing of his petition for writ of certiorari.

Dated: April 22, 2004

Respectfully submitted,

Stephen Charles Fiebiger
Counsel of Record
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Stephen C. Fiebiger, certify as follows:

1. I am the attorney for Petitioner in this case. I prepared this Petition for Rehearing of Petition for Writ of Certiorari.

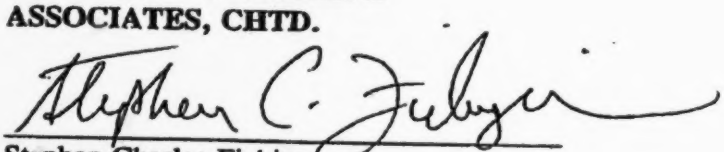
2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition for Rehearing to intervening circumstances of a substantial; or controlling effect or to other substantial grounds not previously presented.

3. This Petition is presented in good faith and not for the purpose of delay.

Dated: April 22, 2004

Respectfully submitted,

STEPHEN C. FIEBIGER & ASSOCIATES, CHTD.



Stephen Charles Fiebiger
Counsel of Record
Attorney for Petitioner